(31,918)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 369

KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

R. E. ELLZEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN LOUISIANA

D. L. 1434

R. E. Ellzey

versus

The Kansas City Southern Railway Company

Petition—Filed July 24, 1923

To the Honorable G. W. Jack, Judge of the United States District Court in and for the Western District of Louisiana:

The petition of R. E. Ellzey, a resident of Caddo Parish, La., with respect represents:

[fol. 2]

I

Your petitioner, R. E. Ellzey, who will be styled plaintiff herein, complaining of the Kansas City Southern Railway Company, which will be styled defendant herein, represents and shows that the plaintiff resides in Caddo Parish, State of Louisiana, and that the defendant is a body politic duly incorporated and is the owner of and operates a line of railroad in connection with and over the lines of subsidiary corporations from Kansas City, Missouri, to Texarkana, Texas, through Leesville and De Quincy, La., and to Port Arthur, Texas, and is actively engaged in business as such railroad corporation in the State of Louisiana and operates its cars and trains and does other business connected with the general business of said corporation in Caddo Parish, Louisiana, having qualified as a foreign corporation to do business in the State of Louisiana by declaring the city of Shreveport to be its Louisiana domicile, designating John D. Wilkins, a resident of said city, as its agent for the service of process.

II

That at the time of the commencement of this suit, since that time and now, your petitioner was and is a citizen and resident of the State of Louisiana and Parish of Caddo in said State.

III

That at the time of the commencement of this suit, since that time and now, the defendant herein was and is a foreign corporation organized and created under the laws of the State of Missouri, domiciled in Kansas City, said State, [fol. 3] and at all times was and still is a citizen and resident of said State of Missouri and a non-resident of the State of Louisiana.

IV

That said suit is one of a civil nature in which there is a controversy between citizens of different states, and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $3,000.00.

V

The plaintiff shows that heretofore, to-wit, on the 10th day of August, 1922, the said plaintiff was a passenger on one of the motor cars furnished and used for the purpose of transporting the plaintiff on its tracks at and near De Quincy and Rose Pine, Louisiana, for the purpose and in the manner hereinafter more fully set out. That under an arrangement between the plaintiff and the said defendant, its agents, servants and employes, the said defendant undertook to safely transport the plaintiff over the said line of railroad and the said defendant selected and furnished the said motor car as a means for carrying out the said contract or arrangement and so safely transporting the said plaintiff over the said line to the town of Leesville, Louisiana, where plaintiff would take passage upon a regular passenger train of the defendant and continue his journey to Shreveport, Louisiana, but that notwithstanding the defendant's duty to so safely and carefully transport the plaintiff over the said road and to exercise a very high degree of care in so doing, that the said defendant failed to

carry out the said contract, agreement or arrangement, and that by reason of defendant's negligence that the said [fol. 4] motor car was caused to leave the track and be wrecked and plaintiff thrown from the track and the bones of his leg broken, crushed and injured so as to permanently incapacitate him, as will hereafter be more fully set out.

VI

The plaintiff shows that on or about the said 10th day of August, 1922, that the plaintiff was a United States Deputy Marshal and that at the request of the said defendant, its agents, servants and employes, the plaintiff accompanied one of its telegraph linemen to guard and protect him while he examined and made repairs on some of the wires of the telegraph line of the said defendant along its said railroad between Leesville, Louisiana, and Port Arthur, Texas; and that for the purpose of getting to the said place where it was necessary to make the said repairs, the said defendant furnished to the said lineman a certain motor car which the said lineman was to and did operate and on which he was to and did carry the plaintiff as a passenger or guard, and that after the said line had been repaired, the said telegraph lineman undertook to carry the said plaintiff to the town of Leesville where the said lineman stated that he intended to board the passenger train for Shreveport, and where it was arranged that the said plaintiff would board the passenger train for Shreveport, and that while the said motor car was being operated for the defendant by and under the control of the said lineman who had been entrusted with its operation and control by the defendant, and while the said motor car was being propelled over the said track toward Leesville and at a point on the said track near the village or town of Rose Pine, that the said motor car left the track and was wrecked, causing the plaintiff to be thrown from the same and the [fol. 5] car to fall upon or run over him and caused him to fall against the ground and other hard substances, all or some of which caused to be inflicted upon him the injuries heretofore referred to and which will be hereafter more fully set forth.

VII

The plaintiff shows that the said motor car was caused to leave the track and be wrecked by reason of the negligence of the said defendant, its agents, servants and employees; that the plaintiff is unable to allege the particular act or acts, omissions, or commissions of the agents and employes of the defendant, or the particular agent or employe whose acts or omissions or commissions caused the said wreck, but this plaintiff does allege that the said wreck was occasioned by the carelessness and negligence of some of the agents and employes of the said defendant, either in the operation of the said car at too high a rate of speed, or by reason of the defective condition of the said car or the track and roadbed, or all or some of said means used by it for transporting the plaintiff over the said line, all of which was due to its negligence and for which it was and is responsible to the plaintiff for the damages sustained by him.

VIII

Without waiving the general allegations contained in the fifth and sixth sections or subdivisions of plaintiff's petition, the plaintiff here alleges and shows that he is informed and believes that the said car was caused to be wrecked and the injuries inflicted upon him by the negligence of the defendant, its agents, servants and employees in the following respects, to-wit:

[fol. 6] That the said car was old, worn and defective and the flanges of its wheels worn and sharp and defective, and that the axles were bent and that the bearings and connections were old, worn and defective, and that the frame of the said car was bent, worn and defective, which caused and permitted an irregular and unsafe motion of the said car, which caused and permitted the wheels thereof to have a tendency to climb the rail or leave the track, all of which was due to the carelessness and negligence of the said defendant, its agents, servants and employes and rendered the said car unsafe as a means for transporting persons over the said road, and that the defendant was negligent in using the said car and causing the plaintiff to be transported over

the said road on same; that the said lineman in charge of the said car negligently ran the same at too high a rate of speed and at a much greater rate of speed than was proper or safe for the same to be run over the said road, and specially in view of the condition of the said car, and that by reason thereof the same was caused to leave the track and inflict upon the plaintiff said injuries.

The said plaintiff here alleges that his injuries were caused in one or both of said respects due to the negligence of the said defendant, that is, that the car was defective and unfit for the service to which it was put, and that such defective condition due to defendants negligence and the negligent use thereof in such condition caused the same to leave the track and inflict said injury; or that the said person operating the said car negligently ran the same at too high a rate of speed, thereby causing the same to leave the track and cause said injuries, or that the same was caused to leave the track and inflict upon plaintiff said injuries in all the respects referred to which constituted negligence upon the part of the defendant.

[fol. 7] IX

The plaintiff shows that when he was thrown from the said car and when the same fell or ran upon him, that by reason thereof the bones of his leg were broken in many places, the bones passing through the flesh and into the ground and that the plaintiff was taken charge of by the said defendant and sent to a hospital or sanitarium of its selection and it undertook to treat and *and* care for the plaintiff and restore him to his former good health, and that the plaintiff was in fact placed in such hospital or sanitarium where the defendant permitted him to remain for more than twelve hours without his injuries being cared for or dressed, during which time the plaintiff suffered great torture both mental and physical; that by reason of the said injuries blood poison or other infections set up in the plaintiff's leg and it became necessary for many drainage operations and drainage tubes to be inserted for the purpose of draining the pus from his leg, and that it was necessary for him to remain in bed many months, during which many operations were performed on his leg, the plaintiff being

required several times to take an general anesthetic to the great danger of his health and life; and that the bones of his said leg failed to reunite and that from the said fractures and broken bones and the operations thereon performed by and under the direction of the defendant, that much of the bones of the plaintiff's leg has been removed, creating and bringing about a shortening of more than three inches in his leg; that his knee, his ankle have become stiff as a result of the said injuries and that the bones have not reunited but there is a false joint in the plaintiff's leg. That by reason of the failure of the bones to unite, and by reason of the shortened condition of plaintiff's leg, and by reason [fol. 8] of his knee and ankle having become stiff, all of which are permanent, that the plaintiff has to use crutches in walking and will have to continue to use crutches in the future.

X

Plaintiff shows that the said injuries and the defective condition of his said leg are permanent in character from which he will never recover; that by reason of the said injuries and the treatment received in the said sanitarium or hospital, that the plaintiff's leg had to be frequently dressed and that the plaintiff had to remain in bed in one position for many weeks and months; that from the date of the said injury to the present time the plaintiff has suffered many physical and mental tortures by reason of the said injury, such mental and physical pain being almost unbearable, and that by reason thereof the plaintiff will continue to suffer great mental and physical pain so long as he may live.

XI

The plaintiff shows that at the time and prior to the time he was injured, he was a young man, twenty-four years of age, earning and able to earn the sum of $150.00 per month, and that by reason of the said injuries he has been wholly incapacitated and unable to earn any money whatever, and that his ability to earn money in the future has been entirely destroyed or greatly reduced; that he had a life expectancy of approximately forty years, during which time he would have continued to earn large sums of money had

he not been injured; that he had suffered great mental and physical pain and will continue to suffer great mental and [fol. 9] physical pain by reason of said injuries; that by reason of said injuries the plaintiff has been damaged in time lost, decreased ability to earn money in the future, mental and physical pain already suffered and endured and mental and physical pain that he will suffer in the future in the sum of to-wit, Sixty Thousand ($60,000.00) dollars actual damages.

Wherefore, the plaintiff sues and prays that the defendant be cited to answer herein, and that upon final hearing plaintiff have judgment against the said defendant in the sum of Sixty Thousand ($60,000.00) dollars, all costs of suit and for general relief.

Jones, Sexton, Jones & Buck, Bullock & Warren, Attorneys for Plaintiff.

Duly sworn to by R. E. Ellzey. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

AMENDED PETITION—Filed October 26, 1923

To the Honorable the United States District Court in and for the Western District of Louisiana:

The supplemental and amended petition of R. E. Ellzey, plaintiff in the above entitled and numbered suit, tendered in obedience to the order of the Court rendered on defendant's exception of vagueness and uncertainty, respectfully shows:

I

That petitioner became a passenger on defendant's motor car in the manner and for the purposes alleged in Article 2 of his original petition.

II

That on or about the date alleged in petitioner's original petition, J. E. Murphy, defendant's shop foreman in the City of Shreveport, Caddo Parish, La., instructed and di-

rected T. M. Merchant, a telegraph lineman, then employed by defendant company, to proceed to De Quincy, La., for the purpose of maintaining and repairing defendant's telegraph line; that the said J. E. Murphy arranged verbally with your petitioner to accompany the said T. M. Merchant to De Quincy, La., and elsewhere on its railroad in that vicinity, for the purpose of guarding and protecting him while repairing its telegraph line; that there was in effect at that time a general railroad strike participated in by the employees of the defendant company, and that by reason of the many acts of violence committed at that time and [fol. 11] the danger of bodily harm to those engaged in carrying on the operations of the defendant company's railroad, the arrangement aforesaid with petitioner became advisable and necessary; that pursuant to said arrangement the said T. M. Merchant, accompanied, guarded and protected by your petitioner, proceeded from Leesville, Vernon Parish, La., to De Quincy, Calcasieu Parish, La., on board a passenger train of the defendant company, for the purpose of locating and repairing defects in defendant's telegraph line in that vicinity; that failing to find at De Quincy, La., the existing defects in defendant's telegraph line, the said T. M. Merchant, acting within the scope of his employment and in the discharge of his duties as defendant's employee, selected the motor car for his transportation and that of your petitioner along and over defendant's railroad between De Quincy and Leesville, in search of the defects in its telegraph line, for the purpose of repairing the same, your petitioner accompanying, guarding and protecting him, as aforesaid, while doing so; that said wreck resulting in petitioner's injuries occurred between said stations, as alleged in the original petition; that both the said J. E. Murphy and T. M. Merchant within the scope of their respective authority, as defendant's agents in the discharge of the duties of their employment in all that was done by them affecting your petitioner and leading up to the accident resulting in his injuries.

III

That the defects in defendant's telegraph line were located and repaired between the towns of De Quincy and De Ridder, La., on its said line; that, thereupon, the said

[fol. 12] T. M. Merchant continued to carry and transport your petitioner over the defendant company's line aboard said motor car for the purpose of reaching Leesville, where they were to board defendant's passenger train and return to Shreveport, petitioner's domicile, but that said wreck occurred and petitioner was injured, as alleged in his original petition, before arriving at Leesville.

IV

That the wreck resulting in petitioner's injuries was caused by the negligence and carelessness of the defendant company in one or all of the following particulars; that it had negligently failed and omitted to keep its roadbed and track in good repair, which had become dangerous for the operation of trains and motor cars over the same that said motor car on which plaintiff was riding, as aforesaid, was old, worn out, defective, in bad repair and unfit for the purpose for which it was being used; that the defendant company acting by and through the said T. M. Merchant, its duly authorized agent and employee, who was discharging his duties within the scope of his employment, negligently and carelessly operated said motor car at a fast and reckless rate of speed, causing it to be wrecked and injuring petitioner as aforesaid.

V

Should the Court find that petitioner was not a passenger of the defendant company, then and in that event, in the alternative, he was a licensee of defendant under the state of facts alleged in his cause of action, and, as such, is entitled to recover herein.

[fol. 13]

VI

Should the Court find that petitioner was neither a passenger nor a licensee, then and in that event in the alternative, he was an employee of defendant under the state of facts alleged in his cause of action, and, as such, is entitled to recover herein.

Wherefore, petitioner prays that this supplemental and amended petition be filed, served and allowed; that he be discharged from the order of the Court rendered on de-

fendant's exception of vagueness, to set forth more specifically his cause of action; that there be judgment herein as originally prayed for.

Jones, Sexton & Jones, Bullock & Warren, Attorneys for Petitioner.

IN UNITED STATES DISTRICT COURT

SECOND AMENDED PETITION AND ORDER FILING SAME—Filed February 1, 1924

To the Honorable the United States District Court in and for the Western District of Louisiana:

The second supplemental and amended petition of R. E. Ellzey, plaintiff in the above entitled and numbered suit, respectfully shows:

I

That petitioner became a passenger on defendant's motor car in the manner and for the purposes alleged in Article V. of his original petition.

[fol. 14]

II

That on and prior to the 7th day of August, 1922 there was a general strike of the shop employees on and along the line of the defendant in Louisiana; that the said defendant claimed to be apprehensive and feared that certain of its former employees who were on a strike, and their friends and sympathizers, would inflict injury and damage to its property and to the employees that it had secured to take the places of the former employees; that said defendant made representations to the U. S. Marshal for the Western District of Louisiana as to its fears and of the danger to its property and employees, and procured the said U. S. Marshal to furnish it a certain number of Deputy U. S. Marshals to act as guard of its property and employees, requesting that such guards be placed under the direction of the said defendant at Shreveport, La., and other places; that the said U. S. Marshal

having agreed to said arrangement, did procure plaintiff, who was then a U. S. Marshal, to act as guard for the property and employees of the said defendant; that the said plaintiff was placed at the shops of the said defendant in Shreveport where he did such duty and performed such service for the protection of the property and employees of the defendant until about the 7th day of August, 1922, when a wreck occurred on the line of the said defendant's railroad near Leesville, La.; that said defendant procured the U. S. Marshal and his office deputy to send the plaintiff with the wrecking outfit of the defendant from its shops in Shreveport, La., to the scene of the said wreck and to guard its property and its employees on said trip, and to do such other and further service in the way of guarding defendant's property and its employees as the foreman of the defendant, or person claiming to represent it, should [fol. 15] direct that plaintiff perform and discharge, the said U. S. Marshal and his office deputy placing the said plaintiff under the direction, control and command of the said defendant and its employees, servants and agents, and directing plaintiff to follow and obey the instructions, directions and demands of the said defendant until the plaintiff should return to Shreveport and be relieved by the said U. S. Marshal; that in accordance with the said plan, the said plaintiff did go with the said wrecking outfit and crew from Shreveport, La., to or near Leesville, and that one T. M. Merchant, a telegraph lineman, was with the said crew or wrecking outfit, which crew or wrecking outfit and the plaintiff were under the direction, control and management of one J. E. Murphy.

III

That when the said wreck had been cleared as above alleged, the said J. N. Murphy, who was in charge of the said employees of the defendant at said place, and whose directions, orders and commands the plaintiff had been directed by his employer to obey, told the said Merchant and the plaintiff that there was trouble on the telegraph line and directed the said Merchant to go to De Quincy, or such other place as the trouble should be found, and to make repairs thereon and then to return to Shreveport;

that the said J. E. Murphy directed, instructed and commanded the plaintiff to accompany the said Merchant and act as a guard for him to protect him and the property of the defendant and to remain with the said Merchant until he should locate said trouble, make repairs and return to Shreveport; that in obedience to the said command, the said Merchant left Leesville and went to De Quincy, and that plaintiff in obedience to said com-
[fol. 16] mand, direction, and instructions, accompanied the said Merchant for the purpose of guarding and protecting him and for the purpose of guarding and protecting the defendant's property.

IV

That the said J. E. Murphy left to the judgment and discretion of the said Merchant the means, manner of transportation, and of locating and repairing the trouble and returning to Shreveport; that when the said Merchant got to De Quincy, he procured the motor car referred to in the plaintiff's original petition and traveled from De Quincy over the said line of railroad until the trouble on the telegraph line was located, and that the said Merchant there made repairs on same, during all of which time the plaintiff accompanied and guarded him as he had been instructed and directed to do; that the said Merchant, acting within the scope of his employment, and having procured the said motor car and traveled on the same to where the said line was repaired, did start to travel from the said place where the said repairs were made to Leesville on the said motor car for the purpose of there housing the said motor car and there catching the passenger train and riding on same to Shreveport, La.; that the said plaintiff in the discharge of his duties and in obedience to the instructions and directions to him given by the said J. E. Murphy accompanied the said Merchant, traveling on the said motor car with him in the direction of Leesville and for the purpose of there accompanying the said Merchant on the passenger train and returning to Shreveport with him as was his duty.

[fol. 17] V

That the negligent acts of defendant alleged in Article IV of plaintiff's amended petition, one or more or all of them, singly or combined, caused the wreck of the said car and the injuries to the said plaintiff.

VI

Should the Court find that petitioner was neither a passenger nor a licensee, then and in that event, in the alternative, he was an employee of the defendant under the state of facts alleged in his petition and this amendment, and as such is entitled to recover herein in this: That the said defendant was a common carrier by railroad, engaged in commerce as such between the State of Louisiana and various other states, and that the said plaintiff was employed by it in such commerce in that he was aiding in keeping up its properties and its telegraph line which was in constant use in the management, movement and dispatch of trains over its line of railroad, engaging in and transporting interstate commerce.

VII

That the said defendant undertook to care for and treat plaintiff's injuries, but that it and those to whom it entrusted him for treatment, negligently failed to provide and give him the proper medical and surgical treatment; that it and they negligently and carelessly permitted his injuries and wounds to become infected and blood poison to develop, which greatly increased the injury and his mental and physical suffering and aided in causing the shortening of his leg, greatly increasing his damages.

[fol. 18] Wherefore, petitioner prays that this supplemental and amended petition be filed, served and allowed; that there be judgment herein as original prayed for.

Jones, Sexton & Jones, Bullock & Warren, Attorneys for Petitioner.

Order

Let the above and foregoing supplemental and amended petition be filed and served as prayed for.

Done and signed in Chambers at New Orleans, La., on the 31 day of January, 1924.

Rufus E. Foster, Judge.

Summonses and Marshal's Returns omitted from the printed record.

* * * * * * *

In United States District Court

Answer—Filed June 21, 1924

Now comes the defendant in the above entitled and numbered cause and without in any manner waiving or abandoning the exceptions heretofore filed herein and still insisting [fol. 19] on same, for answer to plaintiff's petitions denies generally and specifically each and every allegation therein contained except such as it hereinafter specifically admits.

Original Petition

I

Defendant admits its corporate capacity and business as alleged.

II

For lack of sufficient information this allegation is denied.

III

It is admitted that defendant's domicile is in the State of Missouri.

IV

Admitted.

V

This allegation is denied and your defendant shows that although plaintiff was on one of its motor cars on August 10th, 1922, he was on there in violation of the rules and regulations of your defendant and without any authority or permit from your defendant and that your defendant never authorized nor consented in any way to plaintiff riding on said motor car, which your defendant shows is an unusual and hazardous means of conveyance, not customarily used in transporting passengers.

[fol. 20] Your defendant further shows that it had no knowledged that plaintiff was on said motor car and that said plaintiff was a trespasser on same.

VI

Defendant admits that plaintiff was a United States Deputy Marshal and was employed by the United States of America on the 10th day of August, 1922, but your defendant avers that at the time of the accident referred to plaintiff was not performing any duties in connection with your defendant's property or employees or business. Your defendant shows that plaintiff and lineman T. M. Merchant after leaving De Ridder, Louisiana, proceeded North to Leesville, Louisiana, and that said trip from De Ridder to Leesville was entirely unnecessary and that lineman, T. M. Merchant, was prohibited under the rules and regulations of defendant company in force at the time of the accident and prior thereto, and well known to said Merchant, from making said trip from De Ridder to Leesville and your defendant especially avers that it did not intrust said Merchant with the operation and control of said motor car from De Ridder to Leesville and that said lineman was never authorized to carry any one on said motor car and your defendant denies that said lineman was acting within the scope of his employment at said time, but avers that he was acting outside of the course of his employment and with said plaintiff was making a wholly unnecessary trip on said motor car, which was entirely unnecessary in the performance of the duties of each of them.

VII

This allegation is denied, and, on the contrary, your defendant avers that plaintiff himself selected the motor car [fol. 21] which was used on said trip and that plaintiff insisted and demanded of lineman, T. M. Merchant, that the same be run at an excessive rate of speed and that the operation of said motor car, especially from De Ridder to Leesville, was directed by plaintiff himself.

Answering further your defendant shows that it is informed and believes, and, therefore, avers that the plaintiff was in a semi-intoxicated condition while riding on said motor car as aforesaid, and that the trip from De Ridder to Leesville was wholly unnecessary and in the nature of a joy ride, controlled and directed by the plaintiff while under the influence of intoxicating liquor, and your defendant shows that plaintiff assumed the control and direction of said motor car and never, at any time, criticized or suggested any change in the operation of said motor car, but, on the contrary, bitterly complained that the car was not going fast enough and did everything in his power to increase the speed thereof.

Your defendant shows that the cause of this accident was the excessive rate of speed at which said motor car was traveling and that plaintiff is responsible therefor as aforesaid.

Your defendant further shows that said motor car was in good mechanical condition in all respects just before the accident occurred and its right-of-way and tracks were in good condition and that said lineman, T. M. Merchant, except as dominated and controlled by the plaintiff as aforesaid, was carefully operating said motor car and keeping a proper lookout, although your defendant specially avers that at the time of said accident and during the entire trip from De Ridder to Leesville said lineman was actively violating the instructions and rules of your defendant, of which he had knowledge, and your defendant further avers that plaintiff himself knew of said violation [fol. 22] of said rules and regulations and actively participated therein, and that said plaintiff further knew that said lineman had no right or authority to make said unnecessary trip because plaintiff well knew that the passen-

ger train for Shreveport, which they intended to board, could be taken at De Ridder or other intervening stations as well as at Leesville.

VIII

This allegation is denied and your defendant shows that plaintiff himself selected the particular motor car used in this instance and dominated and controlled the operation of same while it was being operated at an excessive rate of speed at the special instance, request, approval and acquiescence of plaintiff.

IX

This allegation as written is denied and your defendant shows that after said injury to the plaintiff it attempted to do all in its power to help plaintiff and that its physicians attempted to treat plaintiff and minimize his injury and restore him to his former state of health, but that plaintiff wilfully prevented defendant's physicians from giving him the proper treatment even after reasonable request had been made of said plaintiff to submit to said reasonable and conservative medical treatment.

Your defendant shows that plaintiff and plaintiff's father and relatives deliberately hindered and prevented defendant, through its physicians, from treating plaintiff's injury properly, and that as a result of this wilful prevention on the part of plaintiff his injuries became much more serious than they otherwise would have been.

[fol. 23] Your defendant shows that it is informed and believes, and, therefore, avers that long prior to this accident plaintiff had suffered from a blood disease, which is, at least, partly responsible for plaintiff's present condition, as will be more fully shown on the trial hereof.

X

For lack of sufficient information this allegation is denied and strict proof thereof demanded.

XI

For lack of sufficient information this allegation is denied and strict proof thereof demanded, and your defendant

shows that plaintiff has never been a business success and was not before his injury a reliable workman in any capacity and that, therefore, his employment and earnings were irregular, and your defendant shows that plaintiff never was able to do much more than make a living and support himself and that he was never able to earn as much as alleged under average conditions, and that plaintiff's employment at the time he was injured was only on account of unusual conditions.

Supplemental and Amended Petition

I

Denied.

II

Denied as written.

[fol. 24]

III

It is admitted that plaintiff and lineman, T. M. Merchant, made an unnecessary trip from De Ridder to Leesville and in all other respects this allegation is denied as written.

IV

Denied.

V

Denied.

VI

Your defendant especially denies that plaintiff was ever employed by it or that the relation of employee and employer ever existed between them. Defendant shows that plaintiff was employed by the United States of America and was under its direction and control at the time of the accident.

Second Supplemental and Amended Petition

I

Denied.

II

This allegation as written is denied and it is averred that when plaintiff was injured he was not performing any duty for your defendant, but was returning to Shreveport

[fol. 25] as a trespasser on your defendant's line, making an unnecessary trip on your defendant's motor car, the said trip being in the nature of a joy ride.

III

For lack of sufficient information this allegation is denied.

IV

For lack of sufficient information this allegation is denied.

V

Denied.

VI

Denied as written.

VII

Denied.

VIII

Answering further your defendant shows that under the laws of the United States and particularly the rules and regulations of the Compensation Commission, plaintiff is entitled to Federal compensation and is drawing same, at this time, and has been for many months past, and your defendant shows that under the Federal Compensation Act the United States is a necessary party to this suit and that plaintiff having applied for and having obtained compensa-
[fol. 26] tion from the Federal Government, has no cause or right of action to prosecute this suit against your defendant.

Answering further, your defendant shows that plaintiff has acknowledged to the United States, through the United States Employees Compensation Commission, that his injuries do not exceed fifty (50%) per cent disability, or the amount of seven thousand, five hundred dollars ($7,500.00), fixed as the amount of plaintiff's disability by the United States Employees Compensation Commission.

IX

In the alternative, and in the alternative only, your defendant shows that should the Court find that it has been negligent in any manner and was responsible for plaintiff's

injury, then and in that event, for the reasons and facts hereinabove set forth, that plaintiff is guilty of gross contributory negligence, directly contributing to the injuries complained of, and that such contributory negligence is especially pleaded in bar of the present action.

Your defendant shows that said plaintiff was guilty of contributory negligence in that he insisted that said motor car be run at an excessive rate of speed and acquiesced and concurred in the operation of same, and also that he was guilty of gross contributory negligence in becoming a trespasser on your defendant's line and in making an unnecessary and hazardous trip on said motor car as aforesaid.

X

Answering further your defendant shows that after plaintiff was injured it incurred for and in his behalf the following medical expenses, to-wit:

[fol. 27] Hospital bill	$1,260.00
X-Ray bill	15.00
Willis, Knighton, Garret & Willis	500.00
Dr. Walke	500.00
	$2,275.00

Your defendant shows that these medical expenses were each and all incurred by your defendant at the knowledge and request of the plaintiff herein and that the services were accepted by him.

Your defendant shows that the aforesaid medical expenses were reasonably necessary in this case and that plaintiff benefited materially thereby.

XI

Your defendant shows that for the reasons set forth hereinabove it is not liable for the accident and injury to plaintiff and that on account of these medical services being rendered to the knowledge and at the request of said plaintiff, and the same having been accepted by him, that plaintiff is legally indebted unto your defendant for the amount

of same, and your defendant is entitled to recover therefor in reconvention.

XII

Answering further, your defendant shows that irrespective of legal liability in this case the plaintiff will receive from the United States Government the sum of seven thousand, five hundred dollars ($7,500.00), and that your defendant, as an act of charity, has advanced for said plaintiff, at his request and for his benefit, the sum of two thousand, [fol. 28] two hundred and seventy-five dollars ($2,275.00), so that plaintiff has already received, or is certain to receive for said injury, the sum of nine thousand, seven hundred and seventy-five dollars ($9,775.00).

XIII

Your defendant shows that this suit is an attempt to mulct your defendant in damages for an injury which would not have occurred had it not been for plaintiff's own actions.

Wherefore defendant prays that plaintiff's demands be rejected at his costs, and that defendant do have and recover judgment in reconvention against plaintiff herein in the full sum of two thousand, two hundred and seventy-five dollars ($2,275.00).

XIII

Defendant prays for all orders and decrees necessary, for full and general relief in the premises, and all costs.

Wilkinson, Lewis & Wilkinson, Attorneys for Defendant.

Duly sworn to by C. H. Lewis. Jurat omitted in printing.

[fol. 29] Copy mailed to opposing counsel, S. P. Jones.

C. H. Lewis, of Counsel.

IN UNITED STATES DISTRICT COURT

Shreveport, La.,
Monday, October 27, 1924.

Court met pursuant to adjournment.
Present: Hon. Ben C. Dawkins, Judge, Presiding.

MINUTE ENTRIES

In the matter of the motion to strike out heretofore argued, submitted and taken under advisement by the Court opinion was orally rendered by the Court sustaining said motion to the extent of eliminating any proof under the allegations other than that of the injuries in dollars and cents.

Whereupon, this case came on for trial according to previous assignment, the plaintiff being present and also represented by his attorneys, Messrs. S. P. Jones and Otis W. Bullock, and the defendant being represented by its attor- [fol. 30] neys, Messrs. Huffman Lewis and Scott Wilkinson, and the following jury was impaneled, accepted and sworn to try the case:

J. T. Jeter, W. O. Weaver, L. W. Harris, E. L. Wheless, W. C. Averett, Jr., A. F. De Graffenreid, N. F. Powell, W. E. Compere, T. J. Trussell, W. L. Simms, Ragen Ford, R. M. Henderson.

At the request of plaintiff's counsel, all the witnesses with the exception of the plaintiff and Mr. Rochelle, claim agent of the railroad, were placed under the rule and instructed to remain out of the Court room during the trial of the case. The trial of the case was then proceeded with, and plaintiff's evidence, partly adduced, and the hour of adjournment having arrived.

It was ordered that this case be continued until tomorrow morning at 9:30 o'clock, the jury being instructed not to discuss the case.

In United States District Court

Defendant's Motion for Directed Verdict—Filed October 28, 1924

In this matter at the close of all of the testimony in the case comes the defendant, through its undersigned counsel and shows unto the Court that under all of the testimony adduced before the Jury now trying the case the plaintiff is not entitled to recover and the Court should direct the jury on all of the testimony to return a verdict for the defendant.

[fol. 31] Wherefore, defendant prays that the Court now direct the Jury trying this case to return a verdict on all of the testimony in favor of the defendant, and for costs and general relief.

Wilkinson, Lewis & Wilkinson, Attorneys for Defendant.

In United States District Court

Bill of Exceptions—Filed April 11, 1925

Taken at the Trial of the Above Numbered and Entitled Case Before the Honorable Ben C. Dawkins, Judge of said Court, and a Jury

Appearances of Counsel

S. P. Jones, Esq., Otis W. Bullock, Esq., attorneys for plaintiff.

Huffman Lewis, Esq., Scott Wilkinson, Esq., attorneys for defendant.

The case was stated to the jury by Mr. Jones, on behalf of plaintiff; and by Mr. Lewis, on behalf of the defendant. At request of plaintiff's counsel, the witnesses were placed under the rule.

[fol. 32] PLAINTIFF'S EVIDENCE

C. W. PAGE, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Jones:

Q. Give us your initials, Mr. Page?
A. C. W.
Q. You are Chief Deputy United States Marshal?
—. ——.
Q. What position do you hold with the Marshal's office?
A. Chief Deputy.
Q. How long have you been chief deputy?
A. Since March, 1918.
Q. You were Chief Deputy then in July and August, 1922?
A. Yes, sir.
Q. Do you remember the circumstances of Mr. R. E. Elzey, the plaintiff here, being appointed Deputy United States Marshal?
A. Yes, sir.
Q. Do you recall the date he was appointed, Mr. Page?
A. I gather from the memorandum made and record this morning, he went into the service on July 12, 1922.
Q. Now, then, in July, 1922, and during the following month, the month of August, 1922, was there any disturbance or strike on in this section of the country?
A. Yes, sir; the strike of the Railway Shopmen's crafts took place on July 1st—that is, became effective July 1st—and lasted until during the early or middle part of October.
Q. Of 1922?
[fol. 33] A. Yes, sir.
Q. That strike was on when Mr. Elzey was employed?
A. Yes, sir.
Q. Now then, after he was employed, was he assigned to duty on any particular railroad, or just in general service?
A. Well, he was one of the men assigned to the Kansas City Southern Railroad; and he first saw duty, I think, at the shops, and from there he was sent away. He was

under the direction, largely, of the Superintendent, and the officers of the Kansas City Southern—that is, their special agents—shifted the men about wherever they saw fit. We just assigned them a limited number of men, and they sent these men about to whatever place along the lines as the necessity required.

Q. And Elzey was one of the men assigned to them?

A. Yes, sir.

Q. They had a reasonably large shop here, I believe, and quite a number of employees?

A. Yes, sir. I don't know exactly how many men they employed, but that is a good big shop, of course; for this entire division.

Q. Now, then, in giving an assignment to this railroad of the deputy marshals, did you act under any Court order or any instructions from anybody?

A. Acted under the instructions from the Attorney General of the United States.

Q. United States Attorney General?

A. Yes, sir.

Q. Commonly known as the Department of Justice?

A. Yes, sir. And the number of these men were determined by conferences with the Judge and the United States Attorney and the Marshal. We would hold joint conferences and decide on just about how many men we [fol. 34] thought were necessary for the proper protection of these lines of railway, and we made requisition on the Attorney General for those men.

Q. That was with reference to the handling of the mails and interstate commerce?

A. Yes, sir; that was to keep the lines of communication open and to protect interstate shipments and the mails and passengers and all character of interstate stuff.

Q. Now then, how long did the plaintiff, or up to what date did Mr. Elzey perform in that service, or about what date?

A. Until he was injured, which I think was on the tenth of August. I believe that was the tenth of August.

Q. You received information to the effect that he had been injured about the tenth of August?

A. Yes, sir.

Q. Do you recall how you received that information, and from whom?

A. I am inclined to think that it was through the deputy in charge at De Quincy, Louisiana, if I remember right; a man named Lilley.

Q. He was a deputy marshal?

A. Yes, sir.

Q. Now then, Elzey was brought to Shreveport, was he not?

A. Yes, sir; he came in on that afternoon train the same day he was hurt.

Q. Then, before he was brought to Shreveport, state whether or not you arranged, or made any effort to arrange, for his care and treatment?

A. Well, I expected to take him to the sanitarium for treatment.

[fol. 35] Q. As a government man?

A. Yes, sir. And Mr. Belvoir, who was special agent of the Kansas City Southern Railroad, and with whom I had conducted nearly all of the negotiations looking to the disposal and assignment of these men, came into the office that afternoon, and I was talking to him about it; in fact, I think he told me Elzey—that Mr. Elzey had been hurt. And I told him I had already received the information that he had been hurt. "Well," he says, "we will take charge of him and send him to our Ward out at the Sanitarium." "Well," I says "I must be assured that they will have an ambulance to meet him, and that he will have proper medical treatment; otherwise, I will take the matter up with Washington by wire." "Well," he says, "we will just let him go right to the Ward." That they had a certain number of wards that they kept here for that purpose. He says, "He can go right into one of the wards and have the care of nurse and physician." I told him that was all right.

Q. Did you later learn whether he had been taken charge of by them or not?

A. I am not sure but what Mr. Kirkpatrick, the Marshal, went out there that night; but I am sure that I sent Mr. Allen out there—one of our office deputy Marshals—next morning to see Mr. Elzey and see that he was having at-

tention. And he was then in the sanitarium and under the care of a physician.

Q. Did you learn under the care of what physician?

A. Why, I think Dr. Walke was in charge of the case at that time.

Q. He is a physician for the Railroad?

A. For the Kansas City Southern, yes, sir.

Q. What wages was Mr. Elzey receiving as deputy marshal?

[fol. 36] A. Hundred and fifty dollars a month.

Q. That was paid by whom?

A. Paid by the Department at Washington, through our office; yes, sir. We paid it ourselves with our regular salary checks.

Q. Then, when he was away from Shreveport, were his wages the same, or was there any difference?

A. Well, he had a four-dollar a day allowance for expenses and subsistence, as we call it.

Q. That is while he was away from Shreveport?

A. Yes, sir; while he was away from his headquarters.

Mr. Jones: I think that is all.

Cross-examination.

By Mr. Lewis:

Q. Mr. Page, who hired Mr. Elzey?

A. The Marshal's office did.

Q. The Marshal's office here in Shreveport?

A. Yes, sir.

Q. That is the United States——

A. I employed him myself; yes, sir.

Q. He was paid through that office?

A. Yes, sir.

Q. And in addition to the wages paid him by the Government, he was given an allowance of about $4.00 a day?

A. He was entitled to $4.00 for every 24 hours while traveling away from official headquarters. The official headquarters were in Shreveport. As long as he was here he only got $150.00 a month. Now, if he went to De Ridder, or wherever he went, he was entitled to $4.00 a day subsistance while away from his official station.

[fol. 37] Q. Mr. Page, you were employing a number of deputy marshals about that time?

A. Yes, sir. We had something like 65 or 70, I think, at that time.

Q. They were all hired and fired through the Marshal's office here, were they not?

A. Yes, sir.

Q. You all were in sole control of those deputies?

A. Yes, sir—that is, they were responsible to us, and we directed them what to do. Of course, we didn't—we assigned certain number of those men to the different railroads. For instance, we had a crew at Monroe. We had another crew assigned down on the T. P. Those men were under the directions, so far as the details of their work was concerned, in the operation of the properties of the railroad, of the railroad. If they wanted to send a work train out, they would pick out two or three of these men and send them out with it.

Q. But they were assigned pursuant to instructions given from the Marshal's office?

A. We would instruct them generally what their duties were; what to do and what not to do.

Q. And they were hired and fired through your office?

A. Yes, sir. They were paid exclusively by the United States Government; by the Department of Justice.

(Witness excused.)

[fol. 38] R. E. Elzey, the plaintiff, being duly sworn as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you live, Mr. Elzey?

A. Cedar Grove.

Q. That is here near Shreveport?

A. Yes, sir.

Q. Your name is R. E. Elzey?

A. Yes, sir.

Q. How long have you lived in Cedar Grove?

A. Well, my father has been living there seven years. Of course, I have been out and in off and on all the way through; but I call it home.

Mr. Jones: You will have to speak a little louder.
The Court: Speak out, Mr. Elzey.

Mr. Jones:

Q. What is your age, Mr. Elzey?
A. Twenty-six.
Q. Where did you live in July, 1922?
A. At Cedar Grove.
Q. Where did you live in August, 1922?
A. At Cedar Grove.
Q. Did you or not hold any official position in 1922?
A. I did; with the United States Marshal's office, as deputy.
Q. When were you appointed deputy Marshal?
A. The twelfth of July, 1922.
[fol. 39] Q. Twelfth of July?
A. Yes, sir.
Q. What was the first work or service assigned to you after you were appointed deputy marshal?
A. I was assigned to the K. C. S. shops, on guard out there.
Q. That is here in Shreveport?
A. Yes, sir.
Q. They have a small, or a large, shop there?
A. Well, it is large. I guess you would call it large.
Q. Is it fenced, or open?
A. Fenced.
Q. Fenced?
A. Yes, sir.
Q. Were you or not there in connection with the general shopmen's strike that was on at that time?
A. I was.
Q. What was the nature of your work there? Was it day light or night work?
A. Well, the first day I worked—the first night I was on, the night of the twelfth, I worked at night; but they only had two of us on there, one day and one night. Then, the next day, they put on—I think there was three in the day

time and four at night, or four in day time and three at night, I don't remember which; but I know there was seven of us in all. So that gave me a day job then.

Q. You were on duty in the day time from then on?

A. Yes, sir.

Q. How long did you remain in service there at the shops?

A. Until I was sent out on this wrecker. I think it was either the 6th or 7th of August.

Q. During the time you were at the shops, under whose direction did you do your work?

[fol. 40] A. Well, when they took us down there, why they carried us to Mr. Murphy.

Q. Who was Mr. Murphy?

A. They called him the Superintendent—J. E. Murphy, I believe, was his initials.

Q. Superintendent of what?

A. Of the railroad or the shop or something. I don't know.

Q. For the Kansas City Southern?

A. He worked for the Kansas City Southern.

Q. He represented the Kansas City Southern in some capacity?

A. Yes, sir.

Q. And they called him the Superintendent?

A. Yes, sir.

Q. Now then, go ahead.

A. They took us to him, and just told us, "We will turn you over to Mr. Murphy." And then he showed us what to do.

Q. Well now, from that time on until you went out on the road, whose directions were you under? Was there any change in them, or did you still remain under Mr. Murphy?

A. Still remained under Mr. Murphy, so for as I know. If there was any change on that point, I didn't know about it.

Q. Now then, you spoke of having left the shop about the sixth or seventh of August, 1922. What were the circumstances of your leaving the shops on that date?

A. Well, they had a wreck down just below Forbing, below Cedar Grove; and they sent the wrecker there to clean up. It was a box car off.

Q. Sent the wrecker?

A. Sent the wrecker, and asked me to go with it.

Q. Who asked you to go with it?

[fol. 41] A. Mr. Murphy.

Q. Well, did they send just the wrecker alone, or did they send the men with it?

A. Well, they sent, I suppose, eight or ten men, and two railroad guards, employed and paid by the railroad company.

Q. And then, you were sent along as deputy marshal?

A. Yes, sir. Got that wreck cleaned up and came back in on the switch there; and while we were sitting on the switch waiting for the passenger train to come by, why Mr. Murphy came out and said that they had orders to go on down and clean up this wreck below Leesville.

Q. Down below Leesville?

A. Yes, sir.

Q. All right, what was done then?

A. They just—everything loaded on and pulled out for Leesville from there.

Q. Did you go with them?

A. Yes, sir.

Q. How come you to go with them?

A. I asked Mr. Murphy if he wanted me to go on down there with them, and he said "yes"; and so I sent word back to my wife and told her I was headed for Leesville and didn't know when I would be back.

Q. Now, it appears here that you have a wife. Was your wife able to come here as a witness?

A. No, sir.

Q. Did you ride on the train of the Kansas City Southern in going down there?

A. We rode on the wrecker with the rest of the crew that went.

Q. On the wrecker with the rest of the crew?

A. Yes, sir.

Q. Where did you go to that afternoon or day or whatever it was?

[fol. 42] A. Well, that was somewheres about four o'clock in the afternoon, I guess. We went into Leesville that night.

Q. Do you know what time you got into Leesville?

A. No, sir; I don't know. I was asleep when we got in there.

Q. Where were you the next morning when you did wake up?

A. In the yards at Leesville.

Q. All right then, where did you go from there?

A. Went from there to this wreck, on out below Leesville, between Leesville and De Ridder.

Q. Down the other way from Leesville?

A. Yes, sir.

Q. Well, was this wrecking crew still with the wrecker?

A. Yes, sir.

Q. What time did you get to that wreck? What time of day, about?

A. Well, it was about seven or seven-thirty; something like that. They started up early and it was only a little ways down there.

Q. Well, what did they do with reference to cleaning that wreck up?

A. Well, they cleaned it up. It was four or five box cars off; a couple of freight cars or box cars and some oil tanks. There was four or five cars off. They cleaned that up that day and got through. It was about seven when we got there.

Q. Then where did you go?

A. Went to De Ridder and stayed that night.

Q. Is De Ridder beyond where the wreck was, on the other side?

A. The other side, south.

Q. South?

[fol. 43] A. Yes, sir.

Q. Then that was probably the eighth?

A. Yes, sir.

Q. Then you stayed all night that night, you say, in De Ridder?

A. Yes, sir.

Q. Where did you stay?

A. I stayed in the hotel all night.

Q. Then, the next day, what did you do?

A. We went back up to Rosepine and picked up an engine there that had been set aside on the switch there, in bad order.

Q. Well, I didn't catch that. You mean the wrecking department went back to Rosepine?

A. Yes, sir.

Q. Did you go with them?

A. Yes, sir; I was with them.

Q. What did they do there?

A. They just picked up this engine—that is, tied on to it and took a couple of pieces off of it. I don't know what the pieces was. I don't know anything about that. But took a couple of pieces off of it so they could pull it, and started in with it.

Q. Started in what direction?

A. Towards Shreveport.

Q. Had they already passed Leesville?

A. No, sir.

Q. Coming towards Leesville?

A. Coming towards Leesville.

Q. Did you go into Leesville?

A. Yes, sir. Just as we pulled into the yards at Leesville, Mr. Murphy came back to a Mr. Merchant on the train——

Q. This man Murphy that you say you were in the charge of?

[fol. 44] A. Yes, sir.

Q. J. E. Murphy?

A. Yes, sir.

Q. What was that which you say that he did?

A. He came back to Merchant on the train. Mr. Merchant was a part of the railroad crew. We stayed together, our seats faced one another.

Q. Who was Merchant?

A. He was a lineman.

Q. Had he been with this wrecking outfit?

A. Yes, sir; all the way.

Q. He was a part of that outfit?

A. Yes, sir.

Q. All right.

A. He came back, to Mr. Merchant and told him that they had some lines tied up down close to Singer.

Q. Close to where?

A. Singer; and that he would have to go back down and repair them; and also told me to go with him.

Q. All right.

A. And they put us off at Leesville then and gave us passes—that is, gave me a pass. Mr. Merchant, of course, already had one, working for the company. Gave me a pass to ride the passenger train down that night with Mr. Merchant, to repair the line. And he gave us special passes to ride the engine too, if we saw fit.

Q. What did he say about riding the engine?

A. Well, he just told Mr. Merchant to ride the engine and try to find the line and repair it that night.

Q. To repair the trouble?

A. Yes, sir; to repair it that night, and hold the train while it was being done. And then told me that I could ride the engine with him.

Q. With Merchant?

[fol. 45] A. Yes, sir.

Q. What was the object of having you with Merchant?

A. To guard him. A lineman had got beaten up two or three days before that; and Merchant would not go without somebody to guard him.

Q. You were sent along, then, to guard him?

A. Yes, sir.

Q. Did you catch the passenger train that was going South that night, towards De Ridder?

A. Yes, sir; caught the passenger train going South that night; and we rode the coach to De Ridder, and we got off the coach at De Ridder and got on the engine.

Q. Where did you have information about the trouble in the line; north of De Ridder, towards Leesville or away from Leesville?

A. Well, the trouble in the line was out from Singer, was the last place they could get from Shreveport, you see; to get messages through.

Q. Where is Singer?

A. Singer is below De Ridder from Leesville, about twelve miles.

Q. Of course, you rode the coach to De Ridder, and then what did you do?

A. Got up and rode the engine on down to De Quincy. And didn't find the trouble.

Q. What time did you get to De Quincy that night, if you know?

A. I believe it was about 12:30 or one o'clock. I don't know; somewhere about midnight.

Q. In getting to De Quincy, what became of Merchant?

A. When we got to De Quincy, he went in—well, we both went in the depot and sat down a few minutes; and he said, "Well, we can't do anything tonight. We will have to [fol. 46] go to the hotel and stay tonight, and go back in the morning, up the line and find it." He said he couldn't locate the trouble after night.

Q. Did you go to the hotel with him?

A. Yes, sir; went to the hotel with him, and got a room together, and slept together in the same room.

Q. Now, did this man Murphy, when he started you out—started Merchant out—and gave him instructions about repairing the line and your guarding him, did he tell Merchant how he would get back and find the trouble and repair it and come into Shreveport, or anything about it?

A. If he did, I didn't hear him. He just told me to go with him.

Q. Told you to go with Merchant?

A. Yes, sir.

Q. You spent the night with Merchant, then, in the hotel?

A. Yes, sir.

Q. Do you recall what time you all got up next morning?

A. Somewheres about six o'clock.

Q. Well, what did Merchant do when he first got up?

A. Well, got up and went down and had breakfast in the Cafe down under the hotel. We stayed upstairs, and went down to the first floor and had breakfast. And we come out and a motorcar was sitting right over close to the hotel, and he says, "There is a motor car to go on now." And he asked some fellow about the motor car, and found out it belonged to some other railroad that run in there. It didn't belong to the Kansas City Southern.

Q. You say Merchant said, "There is a motor car to go on?"

[fol. 47] A. Yes, sir.

Q. Was that motor car about the tracks anywhere?

A. It was sitting opposite this other track.

Q. Well, when he got that information then, what did he do?

A. He said he would go down in the yard there at De Quincy and get the linemen's motor car that the linemen used all the time. And I went with him.

Q. You went with him?

A. Yes, sir.

Q. How far did you go from the hotel, approximately?

A. Well, I would judge, about two or three hundred yards down the track into the yards.

Q. What did he do when you got down there?

A. We got this motor car out.

Q. Got it out of where?

A. Out of the tool house or something; some kind of a house; and pushed it out on the track.

Q. Was that tool house locked or open?

A. I don't remember whether that tool house was locked or not. Put it on the track, and he and I together pushed it for about, I reckon, half a mile, and couldn't get it to run; and so we put it——

Q. (Interrupting.) Did you ever get it to running?

A. Never did get it to run. Put it in that house—put it off at the section tool house.

Q. Is that the same place where you found it?

A. No, sir; about a half mile up the track towards Shreveport; almost through De Quincy from where we found it.

Q. Then you simply put it off the track. And what did he say then?

A. Well he said that the road master's car was stopped up by the depot, and he would go up and get it.

[fol. 48] Q. Where did you go?

A. Went back to the depot. And this road master's car——

Q. (Interrupting.) Where was the road master's car?

A. Sitting right by the depot.

Q. There in the yards at De Quincy?

A. Yes, sir.

Q. Well, all right, he went there, you say. What did he find out about it?

A. Didn't have any gas or batteries in it. And we went in a room there that had a whole bunch of stuff in it, at the depot, one room in the depot there; and he unlocked it and went in there and got six cells of batteries; six cells of the

ordinary dry cell batteries; and put them in the motor car; and went over to another place there and got some gas from a fellow, and put it in and put it on the track and pulled out.

Q. How did he get into that store room or whatever it was, to get the batteries?

A. He had a key for it.

Q. He had a key for it?

A. Yes, sir.

Q. Then you say you pulled out. What direction did you go? Towards what place?

A. Towards Shereveport, to Leesville.

Q. Had you ever had any experience in running or operating a motor car?

A. Never rode one before.

Q. You had never ridden a motor car before that?

A. No, sir.

Q. Had you had any experience in the operation of railroads?

A. No, sir.

Q. Had you ever worked in the train service?

[fol. 49] A. No, sir.

Q. Or in any kind of service for a railroad?

A. No, sir.

Q. All right, then you were—who was operating the car?

A. Merchant.

Q. Why did you go with him?

A. Because Mr. Murphy told me to.

Q. You went with him to guard him?

A. Yes, sir.

Q. All right, you went on down the road towards Shreveport?

A. Yes, sir.

Q. And I suppose, towards this place called Singer?

A. Yes, sir.

Q. Well then, did anything unusual happen to you as you went along?

A. Yes. We saw about eight men this side of DeQuincy—There was about twelve or fifteen men, maybe more, riding horseback. All of them had shotguns and Winchesters or something. And just before we got to

them—they all had them laying across their saddle—and just before we got to them, they kind of raised them and some of them took them under their arms, and some of them stood the barrels straight up off the saddle; and Merchant began to slow down, and I says, "What are you going to do?" He says, "They are going to stop us." I says, "Shoot the gas to it. I don't think they have got nerve enough to shoot." And so he shot the gas to it and went by and they never offered to do any damage.

Q. Well, you passed them by. Did you then continue on your journey?

A. Yes. About two miles from where we passed these fellows, the gas line broke, from the tank to the carburetor; [fol. 50] and from there into Singer, I believe, we fed—or he did. I didn't know anything about it—he fed the carburetor with a bottle; and up hill, I would have to get off and help push up hill. We finally got into Singer.

Q. Do you have any idea what time it was when you got into Singer?

A. No, sir.

Q. When you got into Singer, what is the first thing Merchant did?

A. Well, the first thing he did there was to examine the wires about the depot, and then went inside and examined the switch. Took something off the wall there and examined the switch, and he said that was where the trouble was; and put it back and then got connected with Shreveport and De Quincy, and could get any one all the way up and down the line. And then he went and took this connection off the motor car and took it over to the saw mill and got it repaired.

Q. Did you go with him?

A. Yes, sir.

Q. What did you go for?

A. I just went with him, that is all.

Q. Well, why?

A. I was told to stay with him.

Q. You went along as a guard?

A. Yes, sir.

Q. Well, you got his gas line repaired?

A. Yes, sir.

Q. Then what did he do?

A. Came back and put it on.

Q. Now then; came back and put it on the motor car?

A. Yes, sir.

Q. Now then, what time of day was it by that time, or about what time?

[fol. 51] A. I don't remember. When we got it on it was just twenty-five minutes to the time that the north bound passenger train was due.

Q. That is the day time train?

A. Yes, sir.

Q. Can you tell us about how far you were from De Quincy at that time?

A. No, sir; I cannot. I judge it to be around 30 miles though.

Q. What did Merchant say, if anything, as to what he would do next, after he got his gas line connected up?

A. Well, he had already said that we would go to Leesville from there.

Q. He had said that?

A. Yes, sir. He said we could not make it back to De Quincy; that we would have to wait there until that North bound train come up, before we could start back to De Quincy, and that we would miss the train for Shreveport, and he said that the motor car would make as good time as the passenger, and we had twenty-five minutes ahead of—had twenty-five minutes to go on up in the yards at Leesville. And I asked him about leaving the car at Singer at the depot there, and he said he could not leave it out in the rain; that he had to leave it under a shed where it would be protected; that the strikers might tear it up if he left it there.

Q. Did he say where he would leave it?

A. He said he would either have to leave it at De Quincy or Leesville; and he said we could not get back to De Quincy in time to catch the train; so we would go to Leesville.

Q. Well, did he start out from there?

A. Yes, sir.

Q. Well, did you go with him?

[fol. 52] A. I went with him.

Q. Why did you go with him instead of staying there at Singer to catch the passenger train?

A. Well, I was sent with him to stay with him.

Q. To stay with him until when?

A. I don't know how long; just until—we got orders to find it and come back to Shreveport, both of us.

Q. You mean to come back to Shreveport with him?

A. Yes, sir.

Q. All right. Then you started away from Singer and started towards Leesville, which is also towards Shreveport?

A. Yes, sir.

Q. Do you recall the next station that you passed through?

A. No, sir; I don't. I don't know whether it was De Ridder—I don't know whether there was a little station between there or not.

Q. Did you finally pass through De Ridder?

A. We passed through De Ridder. We stopped there somethimg like three minutes. I have an uncle that lives right on the track there at De Ridder, just right upon the bank; and I asked him to stop there a minute and let me run in and see him. And I just run in, "Howdy do! Goodbye!" together, and got back on the car. He never did kill the engine I don't think. I got on and pulled out again.

Q. What was the next station that you passed on that car?

A. Rosepine.

Q. Going in what direction?

A. To Leesville, North.

Q. Well, after passing Rosepine, how far did you travel on the motor car?

[fol. 53] A. Well, I judge about a half mile; something like that.

Q. What happened then?

A. It jumped the track.

Q. It? The motor car?

A. Yes, sir.

Q. Up to that time had you had anything at all to do with the running of the car?

A. No, sir.

Q. Merchant had run the car all the way?

A. All the way.

Q. Did you know anything about running it?

A. I say, he run it all the way. I helped him push it up those hills while that gas tank was broke.

Q. I mean, you did not operate it?

A. No, sir.

Q. You knew nothing about running the car?

A. No, sir.

Q. Did you know anything about the speed of a motor car, the speed that a motor car was capable of making?

A. No, sir.

Q. Anybody on that car besides you and Merchant?

A. No, sir.

Q. When this car wrecked or jumped the track out from Rosepine, what happened to you?

A. Well, it throwed me and broke my leg.

Q. Threw you where?

A. Throwed me on the ground, or that is where I dreamed myself to be at.

Q. Which side of the track did it throw you?

A. On the right-hand side of the track.

Q. Which side did the car go off on?

A. On the right.

Q. You say your leg was broken?

[fol. 54] A. Yes, sir.

Q. What part of your leg was broken?

A. Well, I didn't know it was broken in but one place at the time; the big bone broke right half-way between the ankle and the knee, and came out through the flesh and went out through my trousers leg and stuck up in the ground.

Q. Part of the bone came through the flesh and through the pants leg and stuck into the ground?

A. Yes, sir.

Q. Well, what did Merchant do then?

A. Well, he started to run on back then and get to the station so he could stop the train as it came up; and I asked him to come and pull my shoe off, and he came back and pulled my shoe off and pushed the car off the track out of the way of the train, and went back up to the station.

Q. He went back to the station?

A. Yes, sir; to Rosepine.

Q. Did he later come back to where you were?

A. Not until the train came. He came down on the train.

Q. How long was it before the train came?

A. About forty or forty-five minutes.

Q. Who was with you during that time?

A. As quick as he could get back to the station and break the news, it was four or five fellows came down, and quite a pretty good crowd there before the train came.

Q. All right now, the train that he was expecting was coming to Shreveport, as I understand it?

A. Yes, sir.

Q. When the train came along, did it stop and take you up?

[fol. 55] A. Yes, sir.

Q. And they put you in a car on the train, I suppose?

A. Yes, sir; put me in a traveling car on the back.

Q. Put you on a bed?

A. Yes, sir; in a bed.

Q. Of course, I suppose nothing had been done to your leg up to that time?

A. No, sir.

Q. Nobody had anything?

A. No, sir.

Q. Well, where did the train first stop?

A. Well, I think there was two or three little places between there and Leesville; but they had a doctor meet the train at Leesville; and he cut the trouser leg off there and pulled it out from under the bone, and bandaged it up, and gave a hypodermic of morphine, and then gave me three morphine table-s to take on the way to Shreveport.

Q. Did he undertake to clean the leg or set it?

A. No, sir; he just pulled the trouser leg back.

Q. It was nothing but a hurry-up job, while they were holding the train?

A. Yes, sir.

Q. And then you came on to Shreveport?

A. Yes, sir.

Q. You say he gave you a hypodermic of morphine?

A. Yes, sir.

Q. Why did he do that?

A. To stop the pain.

Q. Had you been suffering any?

A. I was beginning to suffer. Yes, sir; I reckon I was.

Q. Much or little?

A. Sir?

Q. Much or little suffering?

[fol. 56] A. Much suffering.

Q. And then this train brought you on into Shreveport?

A. Yes, sir.

Q. Do you recall about what time you got to Shreveport, or did you know?

A. No, I don't know. When we got to the sanitarium why it was just eight o'clock.

Q. Well, at the depot here at Shreveport, you were taken off the train, I presume. I don't suppose you walked off there?

A. Yes, sir; I was taken off.

Q. And put in an ambulance or some kind of conveyance. What was it?

A. Ambulance.

Q. And then where were you taken?

A. To the Schumpert Sanitarium.

Q. Was there any doctor at the train?

A. If there was I didn't see him.

Q. Do you recall who went with you in the ambulance to the Sanitarium?

A. My father.

Q. Your father, met the train?

A. Yes, sir; my father met the train at Cedar Grove.

Q. Then, when you were taken to the Sanitarium at Shreveport—Schumpert Sanitarium, what doctor was there to meet you or see you?

A. There wasn't any.

Q. Well, did any doctor see you that night?

A. Doctor Walke came in there in quite a while; I don't know how long, an hour or such a matter, before he came.

Q. That is Doctor Walke?

A. He said he was the Railroad physician for the Kansas City Southern.

[fol. 57] Q. He showed up about an hour after you got in there?

A. Yes, sir; something like that.

Q. Well, about what time of day were you hurt?

A. Somewhere around one o'clock.

Q. One o'clock in the day time?

A. Yes, sir.

Q. And then somewhere before nine o'clock Doctor Walke saw you at the sanitarium?

A. Yes, sir.

Q. What did he do?

A. Cut the bandage off that was on there, and wrapped it up with an old wire splint that comes half way up around the leg and reaches out about like that (illustrating), and bandaged it back up and sent me down to the room.

Q. Did he reduce the fracture—put the bone back together and put it in splints?

A. No, sir; pulled at it, and I went to hollowing, and so he just put it in those splints.

Q. Did he clean the leg up entirely that night?

A. No, sir.

Q. He just wrapped it up?

A. Yes, sir.

Q. All right. Did he give you anything to help you through the night?

A. Yes, he gave the nurse orders to give me morphine, I reckon; she gave it to me anyway.

Q. Do you know how much morphine you had to take that night?

A. No.

Q. Did you take all those three table-s that the doctor gave you at Leesville?

A. Yes, sir; I took them up before I got to Shreveport.

[fol. 58] Q. Why?

A. To keep down pain.

Q. Did it keep the pain down entirely?

A. No, sir. It numbed me enough so I could kinder nap along, take a nap along.

Q. All right, when did the—what Doctor saw you next after Dr. Walke wrapped your leg up that night?

A. Well, next day about eleven o'clock, he and Dr. Elzey came.

Q. About eleven o'clock next day?

A. Yes, sir.

Q. What did they do to it when they came in that time?

A. That I don't know; what all they done to it. They had to put me to sleep that time.

Q. Did they put you to sleep before they unwrapped it?

A. Yes, sir.

Q. You mean by that that they gave you a general anæsthetic?

A. Yes sir; ether.

Q. Gave you ether?

A. Yes, sir.

Q. And when you came to yourself what was the condition of your leg? What was the position of your leg, and what was on your leg?

A. I could not tell. I was back in the room and had what they call a Thomas Splint on my leg.

Q. How was that fastened on there?

A. It has got a big ring comes around up here.

Q. You mean to say, up to your thigh?

A. Yes, sir; right on the crotch, and two rods comes out here and comes together right out here (illustrating).

[fol. 59] Q. Just below the foot when you say "out"?

A. Yes, sir; out about eight or ten inches away from around the foot.

Q. Beyond the foot?

A. Yes, sir.

Q. How was your leg attached to that splint?

A. Well, they had some towels pinned, and lifted the towels back enough that my leg would just lay right down in the towel, you see; and some adhesive tape on each side of my leg and pulled out and tied to the end of that Thomas Splint so it would keep my leg stretched.

Q. Could you tell whether the fracture had then been reduced; whether the ends of the bone had been brought together?

A. No, I could not tell about that. It felt like it though.

Q. Could you see the wound in the leg where those bones had come together there at that time?

A. Not until they dressed it the next time.

Q. When they dressed it could you see the wound?

A. Yes, sir; I could see it.

Q. The bone had been put back in there?

A. Back inside, yes, sir.

Q. I will ask you whether or not there had been any pus, or whether there was any pus appeared before they dressed this leg?

A. I don't know.

Q. In other words, in the most stylish language, had infection set up?

A. I don't know. You see they didn't unwrap it until they put me to sleep; and I couldn't say?

Q. And then after they opened it the next time?

A. When they set it and all they put some packing in there, and the next time they dressed it they pulled this packing out, the packing was all soaked with pus then.

[fol. 60] That is the second day after you were hurt?

A. Yes, sir; second or third, I don't remember which; just a day or two; first time they dressed it.

Q. And it was full of pus?

A. Yes, sir.

Q. Then how long did you remain there with this Thomas splint on?

A. For about ten weeks.

Q. During that time, what was the condition of the wound or opening in your leg where it had been broken?

A. There was a pus coming out of it all the time.

Q. Much or little?

A. Well, of course, it started with a little and kept getting larger and larger until there was a whole lot of it.

Q. What was your condition with reference to fever and disability generally?

A. Well, I don't remember just how long it was before I began to have high fever. I think he called it the Dengue.

Q. He called it Dengue? Who called it that?

A. Doctor Walke.

Q. Approximately, how long after you were hurt?

A. Well, I don't know. Before I began to have the high fever, there was, of course—I was not supposed to know I was having any fever at all, but I happened to have a thermometer under the pillow that I kept there.

Q. You could tell whether there was some unnatural heat?

A. Yes, sir; I was having some little fever, but not so very much or not enough to amount to nothing until I had been there a month or six weeks, when I began to have this high fever.

[fol. 61] Q. What was the condition of your leg during that time? Was there still pus in your leg?

A. Pus in it all the time.

Q. What was the condition with reference to hurting?

A. I was taking dope all the time.

Q. Well, was the leg hurting or not hurting. I am asking you about that.

A. It was hurting.

Q. What was the character of the hurting, as to whether or not it was a steady pain or throbbing pain, or coming and going pain, or what?

A. Throbbing, steady pain, and nothing would ease it, only that I would get so full of morphine that I would just go to sleep anyhow.

Q. About how long did you say it was after you got hurt before you had that high fever?

A. It was about six weeks.

Q. Now then, you say that they called it the Dengue?

A. Yes, sir.

Q. How long did you continue to have it?

A. I had it up until I was operated on.

Q. Did it get any better?

A. No, sir.

Q. Pus in your leg all the time?

A. Yes, sir.

Q. Paining you all the time?

A. Yes.

Q. Then how long did Dr. Walke continue to treat you, after you went into the sanitarium? How long did he continue to treat you alone—that is, treat you without any other doctor being called in?

A. On the 25th day of October, I think it was, they called in Dr. Wallis and Garrett.

Q. Who called them in?

[fol. 62] A. I don't know whether it was the Marshal's office or the Railroad Company; but whoever it was, I was the one who insisted on it.

Q. You asked for them to be called in?

A. Yes, sir.

Q. Were you still having that fever?

A. Yes, sir.

Q. Were they still calling it Dengue?

A. I don't know what they called it then.

Q. Well, what doctors came in to see you then?

A. Doctor Willis, Sr., and Doctor Willis, Jr., and Doctor Garrett.

Q. By the way, did Mr. Knighton treat you during the time you were there?

A. After I was treated the second time, I took indigestion and he treated me for indigestion.

Q. Well, Doctors Willis, Garrett and Willis came in and held a consultation?

A. Yes, sir.

Q. Was Doctor Walke present?

A. No, sir.

Q. Do you know anything about how he happened not to be present?

A. Well, that morning he came in and dressed my leg, and he said that I had been bucking this treatment ever since he taken hold of the case, and if I was wanting some other doctor now I could get them. I had asked him for old Dr. Willis as counsel.

Q. You had asked him to call Dr. Willis in?

A. Yes, sir.

Q. And he had never done it?

A. No, sir.

Q. How long had you been there before you asked him to call Dr. Willis in?

[fol. 63] A. Well, just a few days; as quick as he told me—He told me I was going to have to have another operation; and I wanted Dr. Willis then as counsel.

Q. You wanted him to council with him about it?

A. Yes, sir.

Q. State whether or not you had been following Dr. Walke's instructions up to that time?

A. I could not help but follow them. I was lying there flat on my back and couldn't do anything else.

Q. I am not asking you what you could help, but I am asking you did you or not follow*ing* those instructions?

A. Yes, sir.

Q. Of course, it is better to follow questions and answers, because it saves time if nothing else. Well, and then Doctors Willis, Garrett and Willis—did they examine your leg?

A. Yes, sir.

Q. You say that was the 25th day of October, 1922?

A. Yes, sir; it was.

Q. You were still in that Thomas splint?

A. Yes, sir.

Q. Of course, your leg was still useless?

A. Yes, sir.

Q. Just what did Doctors Willis, Garrett and Willis do after they were called in?

A. Well, they came in that day and examined my leg and taken the bandage off, and just raised the Thomas splint up and felt around under there; and he says, the pus was all up in my knee and that they would have to operate on me the next morning.

Q. All right. I didn't really mean to ask about what they told you, but that is all right. The next morning, did they do anything?

A. Yes, sir.

[fol. 64] Q. What did they do?

A. They operated on me.

Q. When was that? The morning of what day?

A. I think that was the morning of the 26th.

Q. Do you recall what time of day they were there on the 25th?

A. No, I don't.

Q. Sometime during the 25th?

A. Yes, sir.

Q. And on the morning of the 26th they operated on your leg?

A. Yes, sir.

Q. Did they put you under a general anesthetic then?

A. Yes, sir.

Q. Of course, you knew nothing about the details?

A. No, sir.

Q. Now then, when you came to yourself and found out what had been done, what was your leg in then to support or hold it? What was the position of your leg, and so on?

A. It was on a wire splint then; had a "V" shape to it, and came on up—plumb up to my thigh, just like the other one.

Q. Like the Thomas splint?

A. Yes, sir; came up the same; the only difference, this one didn't have the big ring.

Q. Then, what was the treatment immediately after that?

A. So, the next day—no, the second day after that—the next day they didn't dress it, next day, but the second day——

Q. On the 27th they didn't dress it, but you think, on the following day, what did they do?

A. They took me up and brocaded the drainage tubes.

[fol. 65] Q. How many drainage tubes did you have in your leg at that time?

A. Four.

Q. Where were they? What part of your leg?

A. There was one went in here and come out at my ankle.

Q. One went in at your knee on the outside?

A. Yes, sir.

Q. And came out at your ankle on the outside?

A. Yes, sir.

Q. That was a rubber tube?

A. Yes, sir; and another went in here, (indicating).

Q. You say the second one went in near the knee on the outside?

A. Yes, sir; and came out at the center of my leg, on top up there (indicating).

Q. At the center of your leg, on top there, which is a few inches above the ankle?

A. I can show you the scar.

Q. You see, the stenographer cannot get that down in the notes that way. We cannot get pictures of them that way.

By the Court:

Q. That is about the beginning of what is termed the lower third?

A. Yes, sir.

By Mr. Jones:

Q. Yes, sir; that is it. All right, and then where were the others?

A. Then there was one went off about here (indicating).

Q. Well, half way between your knee and your ankle?

A. Yes, sir; and came out at my ankle.

[fol. 66] Q. That went on the outside?

A. Yes, sir.

Q. I believe that makes the four of them, does it?

A. I believe it does.

Q. What was coming out of the ends of those tubes, if anything?

A. Well, they were stopped up until they put some water pressure on them and opened them up and pushed the pus out.

Q. Pushed the pus out?

A. Yes, sir.

Q. Did you ever see any of those tubes after they were taken out of your leg?

A. Yes, sir; saw them put them in.

Q. Now then, how about the tubes; were there any holes in them?

A. Yes, sir.

Q. It was a perforated tube so that the pus would drain into the tube?

A. Yes, sir.

Q. From the surrounding flesh into the tube?

A. Yes, sir.

Q. How long did those tubes remain in there before another operation was performed or something else done to your leg?

A. It was nine days until they made an incision right under my leg there.

Q. About the upper third?

A. Yes, sir; about the upper third. And they pulled one of the tubes out of this side here and run it in here and out at my ankle.

Q. Out at the ankle?

A. Yes, sir.

Q. That was underneath your leg?

A. Yes, sir.

[fol. 67] Q. Then, how long before something else was done to it?

A. Well, just every three or four days they would have to open up the pus box. They dressed it every day then, you see.

Q. How long did that continue?

A. I think the tubes stayed in my leg; I think it was 18 days before they took the last tube out. Then they kept pad packing in the *w*hole wherever they pulled the tubes out.

Q. And that kept up how long?

A. They kept that up until it healed up.

Q. Well, about how long?

A. Oh, about three weeks, I guess, after they took the tubes out.

Q. You mean that they kept the wound open, only packed with gause, to keep it from healing over on the outside?

A. Yes, sir.

Q. So it would heal up from the inside?

A. Yes, sir.

Q. To granulate it from the bottom, so to speak?

A. Yes, sir.

Q. Now, during that time——

—. ——.

Q. Then, after these wounds which you have described healed, what was the condition of the original wound where the bone came out through the flesh and stuck into the ground?

A. Well, it was still open, and stayed open for—well I don't know—about two months after the second operation, before it healed over, because it had to heal over that bone that was stuck out you see.

Q. That would bring it up to about what time in the year that that healed over?

A. I don't remember. Let's see; something along in January, I think, I had the last operation.

[fol. 68] Q. What was the last operation?

A. When the snow was on the ground, in 1923, I know.

Q. Well, what was the last operation?

A. Well, in the second operation they shortened the large bone about the center of my leg there. (Indicating.)

Q. When was that performed? That was performed before this healed over?

A. Yes, that was performed on the 26th day of October, when Dr. Willis and Willis, I think, first took hold; he shortened the large bone.

Q. Took some of the dead bone out?

A. Yes, sir. And then the last operation was to——

Q. Wait a minute. Did they shorten the little bone at that time?

A. No, sir. That was what they did at the last operation. They had to make it same length as the large bone.

Q. The last operation, was that before the original break had healed, or afterwards?

A. No, sir; it was healed.

Q. This last operation you speak of was when the snow was on the ground, in 1923?

A. Yes, sir.

Q. Sometime in January or later?

A. Yes, sir.

Q. What was done to your leg then?

A. They shortened the little bone then to match the big one.

Q. Had the big bone united at that time?

A. Well, they thought it had partially united, but they didn't have a good firm union.

Q. And that piece was taken out of the little bone then at that time?

[fol. 69] Yes, sir.

Q. Were you put under a general anaesthetic then?

A. Yes, sir.

Q. Then, after that, how long before the wound healed up?

A. About two or three weeks, or something like that.

Q. Now then, during all of that time had you ever been able to get out of bed?

A. Yes, after this I got out of bed, before this place healed, here—that is, I got in a rolling chair.

Q. Before the original wound in the place where the bone came through had healed?

A. Yes, sir.

Q. About what time in the year did you first get into a rolling chair?

A. Something like a month or six weeks after I was operated on the second time, or maybe longer.

Q. Somewhere around the first of December, then?

A. Yes, sir.

Q. Or a little later?

A. Yes, sir.

Q. Had you been able to get up on crutches before this operation on the little bone of your leg that you have spoken of?

A. No, sir.

Q. You had not?

A. No, sir.

Q. Then, after that was operated on, did you still remain in the rolling chair after that healed up?—of course, I suppose you were in bed until that healed?

A. I stayed in the bed until that healed, and then I got back in the rolling chair.

Q. How long were you in the rolling chair before you were able to get out of the rolling chair?

[fol. 70] A. I stayed in the sanitarium until the 8th day of March, and I then went out home on the 8th day of March, and stayed in rolling chair a month after I went home.

Q. You had not gotten out of the rolling chair when you went home in March?

A. No, sir.

Q. Then you first got out of the rolling chair sometime in April?

A. Sometime along the first of April.

Q. How did you get about after you got out of the rolling chair?

A. Used crutches.

Q. How many?

A. Two.

Q. What was the condition of this place where your leg had been broken, at that time, with reference to whether it was a solid leg or otherwise?

A. The ex-ray picture showed it was a partial union.

Q. I am not asking about the ex-ray.

A. I couldn't add any idea on it at all.

Q. What was the condition as to whether or not it was moveable here (indicating) or not?

A. Yes, you could take you hand, like that (indicating), and see it working in there a little bit.

Q. There at the place where it had been broken?

A. Yes, sir.

Q. How long did it continue that way, Mr. Elzey?

A. Well, I don't know exactly. It was four or five or six months after I got on crutches.

Q. Four or five or six months?

A. Yes, sir.

Q. All right. Was Dr. Willis' firm still treating you at this time that you have told about, since 25th of October?

[fol. 71] A. Yes, sir.

Q. Now then, did you finally pass out of their charge or did they finally cease to treat you—Dr. Willis & Garrett?

A. No, sir; they still make reports on me to the Government.

Q. But I am speaking about actually treating you?

A. Well, they have not given me any actual treatment in a good long time.

Q. I will ask you whether or not you followed the advise and instructions of Doctors Willis, Garrett and Willis and Knighton, after Dr. Walke gave up your case.

A. Yes, sir.

Q. Have you done anything further than that, with reference to getting reports on your leg?

A. Yes, sir; they have. Doctor Willis then recommended me to the—I mean, the Marine Hospital at New Orleans recommended an osteopathic surgeon, and Dr. Caldwell—that is, a lady that works at his office, gave me electric baking and massaging.

Q. You are speaking about the New Orleans Hospital. What hospital did you go to at New Orleans?

A. The Marine Hospital.

Q. United States Marine Hosiptal?

A. Yes, sir.

Q. All right, is that a hospital that belongs to the Government or is it one of the New Orleans hospitals at which the Government keeps its patients, or do you know?

A. I don't know. Evereything around there is Government men, doctors and all.

Q. Everything looks like——

A. Military outfit.

Q. Uniforms; military outfit?

fol. 72] A. Yes, sir.

Q. Did you go there for treatment or for examination?

A. I went there for examination.

Q. When was that, Mr. Elzey?

A. Well, I went twice, but I don't remember just the dates.

Q. Well, about? I don't mean the exact date.

A. One time, I think, was along in November.

Q. November of what year?

A. 1923.

Q. That was more than a year after you were hurt?

A. Yes, sir.

Q. Now, at whose instance did you go there?

A. The Compensation Commission.

Q. You went at the instance of the Government?

A. Yes, sir.

Q. Then, you went there later, at some other time, you say?

A. I don't know whether it was before that I had been down there, or afterwards. It seems to me like it was along in September I went first time, and then the second time in November.

Q. Then you say that somebody gave you advice to go to an osteopathic surgeon?

A. Yes, sir.

Q. Did they tell you what surgeon that you might go to?

A. They did not then.

Q. Did they later?

A. They wrote Dr. Willis and Dr. Willis, I think, recommended this lady that gave me the treatment.

Q. Who is this lady, do you know?

A. No, sir; I don't know her name. She is a foreigner.

[fol. 73] Q. She lives in Shreveport?

A. Yes, sir.

Q. In whose office was it?

A. Dr. Caldwell's office.

Q. Dr. Caldwell is a regular practicing physician here—osteopathic surgeon?

A. Osteopathic surgeon.

Q. What was the kind of treatment which you received there?

A. They put my leg in an electric baker, and kept it there and baked it a while, and then took it out and massaged it and worked the joints and tried to limber it up.

Q. How long did you take that treatment?

A. About two months.

Q. Did you continue to take it as long as they advised you to?

A. I took it until she said she could not do me any more good without an operation.

Q. When did you take that treatment?

A. That was sometime this year.

Q. Sometime in the year 1924?

A. Yes, sir.

Q. In the meantime you had filed your suit in July, 1923, I believe?

A. Yes, sir.

Q. Now, I see you are now wearing a brace?

A. Yes, sir.

Q. Apparently a steel brace?

A. Yes, sir.

Q. And apparently a specially made shoe. Is that correct?

A. Yes, sir.

Q. Do you know whether your right leg—being the leg that was injured—is the same length as the other leg?

[fol. 74] A. It is two and a half inches shorter.

Q. Do you know that now, or is it two and a half or three and a half?

A. Three and a half; yes, sir.

Q. Three and a half inches shorter than the other leg?

A. Yes, sir.

Q. When did you put this brace on it?

A. I don't know exactly; somewheres along about Christmas, though, I think; the last of the year.

Q. Up to that time, had you been walking on crutches?

A. Yes, sir.

Q. One, or two?

A. Two.

Q. Two crutches. Now then, you put this brace on at whose instance?

A. Doctor Willis and Garrett's.

Q. The doctors that were treating you here?

A. Yes, sir.

Q. When you put that brace on, did you continue to use one or two crutches?

A. Continued to use two crutches for about four or five months—three or four.

Q. After you put the brace on?

A. Yes, sir. And then I used a crutch and a walking stick, up until a couple of months ago when I laid down the walking stick and went to using one crutch.

Q. What is the condition of your right knee—that being the knee of the injured leg?

A. Well, my knee is stiff. That is all that will work right there (indicating).

Q. In other words, sitting in the chair, now, does it come back straight to the edge of the chair? Will it come back straight to the edge of the chair?

[fol. 75] A. No, sir; not hardly.

Q. Hardly comes back to where it is straight down from the chair?

A. No, sir.

Q. While you are sitting in a straight chair?

A. No, sir; it lacks just a little.

Q. It lacks a little?

A. Yes, sir.

Q. What is the condition of the ankle of that foot?

A. Well, the ankle is partly paralyzed.

Q. What is its condition with reference to stiffness, or not?

A. Well, I just have very little working in it.

Q. Can you lift your—state whether or not you can—keep your feet down just normally. You can lift your right leg up, I presume?

A. Yes, sir.

Q. And now, with your leg crossed or in any position, can you lift your toes back towards your knee on your right foot?

A. No, sir.

Q. You can't lift it at all?

A. I cannot move them.

Q. You have got no control over it at all?

A. No, sir. Yes, I can push it down.

Q. You can push it down?

A. Yes, sir.

Q. But you cannot push that toe towards the knee?

A. No, sir.

Q. Can you take your hand and bring it up?

A. Oh, a little bit.

Q. You can bring it up just a little?

A. Yes, sir.

Q. Can you bring it up anything like you can the one on your other foot?

[fol. 76] A. No, sir. I can bring it up just about to a level.

Q. Just about to a level?

A. Yes, sir.

Q. Now then, what is the condition of that foot and ankle with reference to whether your toe points out naturally, or otherwise, while standing?

A. The large toe and the one next to it points out; the next two double back under like that (illustrating).

Q. That is all right, but you didn't catch me. You see, I stand normally here—that is, normally for me.

A. Well, it is throwed out a little.

Q. Out to the right a little?

A. Yes, sir.

Q. Turns out more than the other foot?

A. Yes, sir.

Q. Now, are you able to bear your entire weight on that foot with the brace on it as you now have it, in walking, Mr. Elzey?

A. Not in walking, but I can standing still.

Q. You can in standing still?

A. Yes, sir.

Q. Why can't you in walking?

A. I don't know; on account of that ankle being stiff and my toes doubled back under like that (indicating), and my weight is on my toes.

Q. On what part of your toes?

A. Right on the end of them, on the nails.

Q. Well, what would be the effect if you tried to walk without your crutch?

A. Well, it would just hurt my toes so bad that I couldn't do it.

Q. State whether or not there is any liability in that leg other than caused by the toes coming out that way?

A. Well, of course, in walking, why it puts the strain on that stiff ankle and hurts it.

[fol. 77] Q. I see. Now then, you have described quite a number of injuries. Was there anything the matter with your heel during those operations?

A. Well, after they put this wire splint on. It got pretty sore, and of course, infection went down in it.

Q. This heel on the right foot?

A. Yes, sir.

Q. What part of the heel?

A. Right on the very back of it.

Q. What was the depth of that sore?

A. Went to the bone.

Q. What is the condition of that place now, as to whether or not it has healed up?

A. The bone is naked now.

Q. You don't mean it is literally naked?

A. Yes, sir. There is a scab over it; but I can soak it in warm water and that scab will peel off and you can see the bone.

Q. Can you raise your pants or trousers so as to show us that leg?

A. Yes, sir. (Witness raises pants and exhibits leg.)

Q. How far up does that brace come?

A. About six or eight inches above the knee.

Q. It does not come any further up than that?

A. No, sir; that is the end of it.

Q. Can you take that and the shoe and the sock off and show it to us?

A. Yes, sir. (Witness removes shoe and sock and brace and exhibits leg to jury.)

Q. Now, turn far enough to the jury for the jury to see it. Show the jury the point where the bone came through when it was originally broken.

A. Right there (indicating).

Q. That is on the inside of the top of the right leg?

[fol. 78] A. Yes, sir.

Q. And this place that you spoke of under your heel.

A. You see, there is a scab on it now, but you can soak it in warm water and that scab will come off and you can see the bone.

Q. Now, Mr. Elzey, can you raise your toes as much as you can?

A. I cannot raise them unless I use my fingers. I can take my fingers and pull them up.

Q. Turn them loose. (Witness exhibits toes to the jury.)

Q. Do you mean that you have no control over them yourself—no will power over them?

A. Not to raise them; no, sir.

Q. You can pull them clock-fashion?

A. Yes, sir.

Q. But you cannot bend them out? Is that what you mean?

A. Yes, sir.

Q. Now, you have spoken of these scars or places where the tubes were put in. Where were those tubes put in?

A. Well, there is one, and there is one, and there is one (indicating). That is a little one right under there (indicating).

Mr. Jones: If there is any question going to be asked about——

The Court: He can slip his sock back on, and if they want to question him——

Mr. Lewis: Your Honor please, to save time and his taking them off again, I would like to ask him to stand on that bare foot as much as he can.

[fol. 79] The Court: All right.

Witness: Do you want me to let down on it?

Mr. Jones: Yes, as much as you can.

Mr. Lewis: I want the jury to see his toes.

Witness: You see, when I put my sock on and ram it in the shoe, I have got no strength. You see, if I put it up in the shoe it pulls it right back and then I have got no strength to raise it back at all, and it stays under (illustrating to jury).

Mr. Lewis:

Q. When your foot was bare though, were your toes turned under, or not?

A. No.

Q. As you are standing now, with your right foot bare, and standing on the floor, are your toes turned under, or not?

A. No, unless I put it in the shoe like that (illustrating).

Q. Standing bare-footed, they don't turn under?

A. No, sir.

By Mr. Jones:

Q. In that connection, lift up and put the foot forward and down, as if walking.

(Witness does as requested.)

[fol. 80] Q. Is that the way it goes as you put it down as you walk?

A. Yes, sir.

Q. Now, sit down, Mr. Elzey. Will you please stick your foot out and let the jury see what you mean with reference to your toe-nails. Gentlemen, please examine that toe.

(Jury examines witness' foot.)

Q. Please state whether the injured part of your right leg is as large or larger than the other leg?

A. It is smaller.

Q. It is smaller than the other leg?

A. Yes, sir.

Q. How about the foot, or do you know?

A. I cannot tell how about it, because I cannot get a plain shoe on it. It has to be a special made shoe.

Q. Mr. Elzey, I believe I asked you how much you were earning and also your age?

A. You asked me my age.

A. Oh, yes; I asked Mr. Page how much you were earning.

A. Yes, sir.

Q. And that was, according to his statement, $150.00 a month, and $4.00 per diem or expenses while you were away from Shreveport?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Has your injury to your leg ceased to pain or hurt you, Mr. Elzey, or not?

A. No, sir; still pains yet.

Q. Well now, does it pain you all the time, or just sometimes?

[fol. 81] A. Well, soon in the morning it does not pain so much. After I am up and about, why it begins to swell on me and begins to pain me then. Of course, it is not a

suffering pain; it is just a kind of dull ache all the way through.

Q. Is that worse at times than other times?
A. Change of weather, why, it hurts worse.
Q. What part of the leg pains you?
A. What did you say?
Q. What part of the leg—what place?
A. All the way from the knee down.

Mr. Jones: That is all.

Cross-examination.

By Mr. Lewis:

Q. Mr. Elzey, how much schooling have you had?
A. I went through the ninth grade.
Q. Went through the ninth grade?
A. Yes, sir.
Q. How old were you when you finished the ninth grade?
A. Sixteen years old.
Q. Sixteen years old?
A. Yes, sir.
Q. After you left school, what did you do? What was your first work?
A. Went to the oil fields and went to work.
Q. How long did you work in the oil fields?
A. Worked in the oil fields about a year and then went to the Army—something like that.
Q. What year did you go to the Army?
A. 1917, I believe it was.
[fol. 82] Q. How long did you stay in the Army, Mr. Elzey?
A. I lacked from the 28 day of June until the 26th day of July staying two years.
Q. And after you left the Army, what did you do?
A. Came back and went to work in the oil fields.
Q. At what kind of work?
A. Working derricks.
Q. Rough-necking?
A. Yes, sir.
Q. Did you work steadily?
A. Yes, sir.

Q. After you—Did you continue in the oil fields until you were employed as a United States deputy Marshal?

A. No, sir. I worked in the oil fields up until September, 1921, I believe—September or October. I don't remember; somewhere along about that time.

Q. 1921?

A. Yes, sir.

Q. All right, Sir; then, after September, 1921, what work were you doing?

A. Me and my brother went in business, in a store.

Q. Where?

A. At Cedar Grove.

Q. How long did you work there?

A. Well, we stayed open there about five or six months, I guess; something like that. Closed up along in February or March or April; somewheres like that, in 1922.

Q. Why did you quit working there?

A. I went bursted.

Q. That was in 1922?

A. Yes, sir.

Q. Then, that was in April?

[fol. 83] A. Yes, along somewheres about April; along there somewhere.

Q. Then, after that, what did you do, Mr. Elzey?

A. I went up here to Blanchard and painted a church up there after that. I didn't have any regular job, but I was kept pretty busy, but just a day or two or a week in a place.

Q. Do you remember what you got for painting that church?

A. I got six dollars a day for the time I worked on it.

Q. You were not working every day? Just round about?

A. After I started on it I completed it before I quit.

Q. Do you find that you can do any active work with the leg in the condition it is in now?

A. I can drive a car.

Q. You can drive a car?

Q. Yes, sir.

Q. Are you working now?

A. Yes, sir.

Q. Where are you working?

A. For the Town of Cedar Grove.

Q. In what capacity?

A. Traffic officer.

Q. Traffic officer?

A. Speed cop.

Q. You drive your own car?

A. I drive mine now; and the town has a Ford that I drive too.

Q. You had a high powered car yourself, didn't you?

A. Yes; it is not paid for yet though.

Q. What kind of car?

A. Chrysler Six.

Q. Before that, you had another high-powered car, didn't you?

[fol. 84] A. Well, it was not so high powered. It was a Nash Four.

Q. Nash Four?

A. Yes, sir; four cylinders.

Q. Why did you get the Chrysler Six?

A. I had a wreck with the Nash.

Q. How fast were you driving when you had the wreck?

Mr. Jones: I cannot see that that is material on cross examination.

The Court: What is the purpose?

Mr. Lewis: I want to show the extent to which he can use his leg, and then I am going to show that he was driving very rapidly at that time. The petition alleges that he was totally incapacitated of doing anything else, and I want to show that he has been fulfilling his duties as traffic cop and show what he is making.

Mr. Jones: I don't object to that.

The Court: There was something about the wreck.

Mr. Lewis: Your Honor, the wreck is only an incident to the other. I withdraw the question.

The Court: I think you have a right to show that he has been pursuing another occupation; what his business is, [fol. 85] in rebuttal of his statement that he is unable to do anything; but to go into the question of a wreck, I don't think that would help solve the case.

Mr. Jones: I really intended to go into that myself, but overlooked it.

By Mr. Lewis:

Q. In your work as a traffic cop, are you required to drive at any fast speeds?

A. Pretty fast sometimes.

Q. How much are you paid as a traffic cop, Mr. Elzey?

A. Fifty dollars a month, and a dollar for every man I catch.

Q. How much has it been averaging per month, your catches?

A. Well, I have been working since the 15th day of May, and I have caught and had fined right at 250 men.

Q. Since the 15th day of May?

A. Yes, sir.

Q. That is approximately $50.00 a month that you have averaged from your catches?

A. Yes, sir; up to now, yes.

Q. And you were paid $50.00 in addition to that as a regular salary?

A. Yes, sir.

Q. That is what your testimony amounts to, is it, Mr. Elzey?

A. Yes, sir.

Q. Speak out so the stenographer can hear you. You are receiving compensation from the Federal Government at this time, are you not?

A. $66.67 a month.

[fol. 86] Mr. Lewis: I am offering this evidence, Your Honor, under the ruling of the Court this morning.

Mr. Jones: We object to that evidence as being wholly irrelevant and immaterial, as to whether or not the Government is paying him compensation.

The Court: The testimony is admitted for the restricted purpose of showing such admissions as may have been made by the plaintiff with regard to the extent of his injuries and the value of the same; and not for the purpose of affecting the question of liability as against this defendant. The objection and ruling to be made general and to apply to all evidence of similar character.

Mr. Jones: I think the law itself controls that matter largely, if Your Honor please; but of course it may be eluci-

dated a little better by an instruction which we will prepare and offer, without going into the matter further at this time.

The Court: Well, I can simply indicate to the jury now what my views are about the matter.

Mr. Jones: I say, the law, as I understand it, limits the compensation to 66 2/3% of $100.00 a month.

The Court: If you desire it, I can dictate into the record what my views are now.

[fol. 87] Mr. Jones: I would be glad for you to do so.

The Court: Gentlemen, as a defense to this suit, the defendant has urged that this plaintiff, being in the employ of the Government at the time of his injury, has since received compensation for those injuries under the National Workmen's Compensation Law, and that is pleaded as an off-set against any sum which might be recovered of this defendant, in the event liability were established. On the motion to strike that defense from the answer, my conclusion was that while this fact is not admissible to relieve the defendant from paying the full amount of damages which the plaintiff may have sustained, if liability be established, at the same time, such evidence would be admissible for the purpose of bearing upon the extent of the injury and the value thereof in money to the plaintiff; but that evidence should be received solely for that purpose, and that it could not be considered as affecting the extent of the recovery against the defendant, but merely as constituting an admission on the part of the plaintiff so far as it may show as affecting the amount which he might be entitled to receive as compensation for his injuries. That is, I think the ruling, Gentlemen.

Mr. Jones: Begging the Court's pardon, it occurs to me that it is not proper to fix the amount of liability, but it would merely be considered as a circumstance in connection with all the other evidence to aid the jury in determining liability.

The Court: That is true, and that is what I have tried to indicate by the ruling. It becomes relevant for the purpose, [fol. 88] as I said, of affecting the question of the extent of the injury of the plaintiff, as to the value in dollars and cents—being a circumstance along with all other evidence,

to be considered by the jury when the case is concluded, to establish the amount, if they find liability on the part of the defendant and that the plaintiff should recover.

Mr. Jones: I think that the jury should be instructed that if the plaintiff recovers, that the duty devolves upon the plaintiff to refund to the Government any money that might have been paid to him as compensation. That is clearly the law.

The Court: Yes, but you have not pleaded that, Mr. Jones, as I recall your pleadings. That is a question for you and the Government.

Mr. Jones: No, I don't think so.

The Court: You have not pleaded it.

Mr. Jones: I undestand we have not pleaded it, but I don't think it is a matter of pleading.

The Court: I don't know. The Government may never demand it of him.

Mr. Jones: I wish to say that the Government is demanding it of him.

[fol. 89] The Court: That is a matter of pleading that you have to put in there. I don't think we are concerned with it now. He is bound by his pleadings.

Mr. Jones: We reserve a bill of exceptions, because the evidence does not show or tend to show an admission upon the part of the plaintiff of any extent of injury or an acquiescence by him as to the extent of his injuries.

The Court: How much was this man getting at the time; $150.00?

Mr. Jones: Yes, sir.

The Court: I believe the maximum is a hundred dollars, under the statute?

Mr. Jones: Yes, sir; it is two-thirds——

The Court: Two-thirds of the maximum which the law allows can be paid in compensation. It is not binding upon any one in the sense that it would be exclusive; but it may have some weight upon the question of the extent of the injury, and I will instruct the jury when the case is finished entirely and after I have heard the argument, just how far it is to be considered.

Mr. Jones: You see, Your Honor please, he gets the greatest amount that the Government pays.

[fol. 90] The Court: I understand. I have read the statute, and that is true. The Act fixes a maximum salary of a hundred a month, and two-thirds of the maximum salary. If he gets less than $33\frac{1}{3}$ a month, he gets his whole salary. It is graduated on that basis. I will go into that fully in the charge to the jury, and if I am convinced by your argument when the case is made up as a whole that this will not have any bearing on it, then I will so instruct the jury; but I am going to let it in for the present at whatever it is worth.

Mr. Jones: We except to the ruling of the Court.

Exception reserved by plaintiff.

By Mr. Lewis:

Q. Mr. Elzey, when did the Government start to paying your compensation?

A. I don't remember; it was a couple of months after I got hurt before I got the check, but they paid up in full.

Q. You received compensation in June, 1923, did you not?

A. In June?

Q. Yes.

A. Yes.

Q. Mr. Elzey, didn't you receive a letter from the United States Employees Compensation Commission, written by Mr. S. D. Slentz, Attorney for that Commission, advising you that your disability had been figured at fifty per cent, and that your disability figured on that basis, in dollars and cents, would amount to the sum of $7,377.57?

[fol. 91] A. Yes, sir.

Q. You continued to receive compensation thereafter, did you not?

A. Yes, sir.

Q. After you received that letter?

A. Yes, sir.

Q. And made no further complaint to the Commission after that time, did you?

A. Yes, sir; that is the cause of my trip to New Orleans, and this Doctor Sanderson. I went to Dr. Sanderson, and also got letter from Doctors Willis & Garrett and sent to the Commission.

Q. But you are receiving federal compensation at this time?

A. Yes, sir.

Q. On the same basis?

A. Yes, sir; $66.67 a month.

Q. Figured on fifty per cent disability?

A. No, sir; that is the fullest amount that they pay.

Q. Mr. Elzey, have you got in your possession that letter which you received from the United States Employees Compensation Commission, of date June 8, 1923, which fixed your disability at fifty per cent?

A. I have that letter at home, but I didn't accept the fifty per cent disability.

Q. You haven't got that letter with you?

A. No, sir.

Q. Can you produce that letter?

A. I can if you give me time to go home, I think.

Q. Will you bring that letter tomorrow?

A. Yes, sir.

Q. Mr. Elzey, I show you a document which I marked "D-1," which purports to be a copy of—certified to by a notary public—of that letter; and I will ask you if that is a copy of that letter?

[fol. 92] Mr. Jones: What is the date? June 8th?

Mr. Lewis: Yes, sir.

Mr. Jones: I presume we have a copy of it here.

Witness:

A. Yes, sir.

Mr. Lewis:

Q. This is a copy of the letter?

A. Yes, sir.

Q. That is the same letter which you have at home?

A. Yes, sir; it reads like it.

Mr. Jones: Now, that is the letter from Mr. Slentz, the Attorney for the Commission?

Mr. Lewis: Yes, sir.

Q. The letter which I have just shown you, Mr. Elzey, I have marked "D-1" on the upper left-hand corner of it,

and the same letter is certified to at the bottom as being a true copy by C. H. Lewis, Notary Public. Is that the same document which I show you?

A. It looks like it.

Q. Going back to the situation on the K. C. S. that day when you were riding that motor car when you were coming north; the first town that you reached after you got the work done was at Singer, Louisiana, was it not, on the Kansas City Southern?

[fol. 93] A. I think that is what it was. I think that is where we did the work.

Q. Then, that is where you fixed the switch and got the line open, at Singer, Louisiana?

A. I think so; yes, sir.

Q. Going north from Singer, Louisiana, in the direction of Shreveport, what is the next town that you pass?

A. I don't know what the name of that is?

Q. Wasn't it Carson, Louisiana?

A. I don't know. That is the first time I was ever down in that country at all; first time I was over on that part of the road.

Q. Do you remember having a conversation with Mr. — Do you remember having a conversation at a little station which was your first stop coming north after you left Singer, with Mr. Adams, the Agent, and Mr. Merchant?

A. I don't know.

Q. Do you remember?

A. I don't remember it.

Q. Do you remember making a stop at some little town before you got to De Ridder? Don't you remember that?

A. No, I was thinking Singer was where the trouble was.

Q. Well, that is where you fixed the trouble, but after you left Singer and going on North towards Shreveport, the next big town was De Ridder. Now, before you got to De Ridder, didn't you make a stop?

A. I don't remember.

Q. You would not swear that you did not make a stop there?

A. Well, I don't remember.

Q. Do you recall this: Didn't the Agent, the Agent at the station or depot agent, didn't he show you a message [fol. 94] from the United States Marshal at a little place called Carsons, telling you to come to De Quincy?

A. I think that was at Singer, wasn't it?

Q. Well——

A. It was where the trouble was is where he showed me that.

Q. Now, you got a message from the United States Marshal at Singer then you say?

A. Yes, sir; to the best of my knowledge.

Q. It was either at Singer or Carson, which is a little stop right close?

A. Yes, sir.

Q. That message was from the United States Deputy Marshal at De Quincy?

A. Yes, sir.

Q. De Quincy is on further south in the direction of Lake Charles?

A. Yes, sir.

Q. With respect to Singer, Louisiana, which is the closest, De Quincy, Louisiana, or Leesville?

A. I don't know which. I don't know anything about the distances of those places. I should imagine De Quincy would be some closer though.

Q. Now, what message did you receive from the United States Marshal when you were at Singer?

A. Well, he said that he had these men picked up that we saw with the runs that morning, and for me to come back and identify them.

Q. Did you go back?

A. No, sir; because Mr. Merchant said he was going on to Leesville, and I couldn't walk back down there.

Q. Who was that message signed by that you received?

A. I don' remember. I did't keep the message.

Q. Was the message from the Marshal's office at the City of Shreveport?

[fol. 95] A. No, sir.

Q. Where was it from?

A. It was from a little stop between there and De Quincy, so I understood it; and the deputy Marshal who was working in De Quincy signed it.

Q. The deputy marshal working there?

A. Yes, sir; I think, the best I remember, it was Thomas.

Q. Would you know him?

A. No, sir.

Q. After you started north from Singer on that motor car, the first large town that you passed was De Ridder, Louisiana, was it not?

A. Yes, sir.

Q. Why didn't you stop at De Ridder?

A. I did stop there about three minutes.

Q. Why didn't you leave the motor car there and catch the train into Shreveport from De Ridder?

A. Just because Mr. Merchant told me he would have to leave it where he could leave it under a house, and there was no place there to leave it, he said. He said the strikers would tear it up if he left it setting out on the track here; that he had to put it in a house.

Q. You know at that point that you could have taken the train at De Ridder as well as Leesville, did you not?

A. Yes, if we could have left the car. I was with Mr. Merchant and I was going with him.

Q. You knew that you could get the train to Shreveport at De Ridder without going further north to Leesville?

A. I didn't know it. I knew that I could, but I didn't known that he could. I was sent with him.

Q. I am just asking you about yourself. You knew that you could have taken it there and come on to Shreveport?

[fol. 96] A. I was taking the chance of losing my job when I didn't stay with him.

Q. Mr. Elzey, with respect to Rosepine, Louisiana, where were you injured, South or North of Rosepine?

A. I think it was—I think it was north. It was towards Leesville. I don't know whether the track runs north and south there or not.

Q. It was North of Rosepine?

A. Yes, sir.

Q. Mr. Elzey, didn't you complain to Mr. Merchant who was operating the car, many times that the car would not go fast enough?

A. No, sir.

Q. You did not?

A. I might have while we were having to feed it with the bottle, while that gas line was broken, and I was having to push it. I might have complained then.

Q. Had you been drinking that particular occasion, Mr. Elzey?

A. No, sir.

Q. Do you ever take a drink?

A. I had not then, not in over a year. I would take one if I could get one.

Q. Mr. Elzey, do you recall whether or not, in the presence of any one that you talked to while making that motor car trip, at one of the stops that you made, that you complained about the speed of the car not being fast enough to suit you?

A. I say, I might have while I was having to push it up them hills, but that is the only time I complained. I couldn't catch my breath after getting it fixed.

Q. Did the car run very fast after you got it fixed?

A. Sure it did.

Q. How fast were you running?

[fol. 97] A. I don't know; it was faster than I want to ride again all right. We didn't have a spe-dometer on it.

Q. Did you have the car wide open?

A. It looked to me like it was. I don't know. I didn't know what wide open was, because I didn't know how to run one.

Q. You folks must have been hitting it up? Do you recall Mr. Adams, the agent at Carsons, Louisiana?

A. I don't remember. The agent that I got the message from, from that deputy marshal is the only one I remember talking to. I don't know whether that was Carson or Singer. I think it was Singer.

Q. Do you know the name of the man that you got the message from?

A. No, sir.

Q. It was the agent at a little town right close to Singer that gave you that message; either at Singer or some town close to it?

A. Yes, sir.

Q. Didn't you tell that agent that that car was going to pull you back if it stayed on the track?

A. I don't remember.

Q. Will you swear that you did not tell him that?

A. Yes, I will.

Q. Now, Mr. Elzey, isn't it a fact that you insisted that the car be run at a high speed?

A. No, sir.

Q. You will swear that that is not a fact?

A. I am swearing that it is not a fact.

Q. What did you say about the speed of the car?

A. I don't remember saying anything about it; only, once or twice I asked him down at De Ridder to slow down in crossing switches. I asked him down there at De Ridder to slow down; that the thing was liable to take off down one of those switches; that he might run into an open switch or something.

[fol. 98] Q. You are testifying under oath, Mr. Elzey, to the effect that you did not urge that man to run that car fast?

A. Yes, sir.

Q. You didn't say anything to Mr. Merchant about the operation of the car?

A. I never after he got it running so fast. I might have before.

Q. After you left De Ridder, going north, towards Rosepine and just before the accident occurred, were you running fast then?

A. The motor car was.

Q. That is what I mean. The motor car was running fast?

A. Yes, sir.

Q. Was it running any faster just before the accident than it was at any time?

A. Well, I really believe it was; because it was downgrade there.

Q. And going down hill made it run faster?

A. Yes, sir.

Q. Did you say anything to Mr. Merchant about the speed of the car when you started down grade?

A. I think it was that switch there was one of the places that he had better slow down in crossing those switches.

Q. I know, but after you got out of town and were going down that grade, did you say anything to him?

A. No, sir.

Q. Then, just before the accident, you made no complaint about the speed of the car?

A. Well, it was not so awfully far from the switch down to where the car had the wreck.

Q. Isn't it a fact that it is more than a half a mile?

A. I don't think so; from the switch.

[fol. 99] By Mr. Wilkinson:

Q. Your fear for safety was to run down one of those switches?

A. What?

Q. Telling him to slow down, you were thinking about getting caught in the frog of one of those switches?

A. I don't know whether it was the frog or what. It might have been a terrapin.

By Mr. Lewis:

Q. Do you recall making a stop at a small town before you got to De Ridder?

A. At which?

Q. Place where the car was repaired?

A. I thought that was Singer where the car was repaired. I might be mistaken in the place.

Q. You remember that the car was repaired?

A. I remember that we had to repair the gas line on the car.

Q. You know that was either at Singer or the next station just above Singer, just north of Singer?

A. Yes; it was Singer or the station just above. I think it was Singer.

Q. You are not positive about that?

A. No, I am not familiar with that country down there.

Q. Do you know a Mr. A. R. Johnson? Do you recall meeting a man by the name of Johnson at the station at which you had the car repaired?

A. No, sir.

Q. Do you recall a man by the name of Adams, at the station at which you had the car repaired?

A. No, sir; I don't remember the name of any of them.

[fol. 100] The Court: Speak a little louder.

A. I don't remember the name of anybody that I met down there.

By Mr. Lewis:

Q. Well, at the station where you had that car repaired, didn't you and Mr. Merchant, the driver of the motor car, have a conversation in the presence of two other men?

A. We talked while we were in the depot there, where we fixed this switch board.

By Mr. Wilkinson:

Q. Is that the same place where you got this wire at the same place where you got the car repaired? You got the wire from the Marshal at the same place where you had the car repaired?

A. Yes, sir.

By Mr. Lewis:

Q. Weren't those two men both present at the conversation between you and Mr. Merchant at the point where you had the car repaired, and weren't they assisting Mr. Merchant in making the repairs to the car?

A. I don't remember.

Q. Didn't Mr. Merchant tell you, in the presence of those two men, that he was tired of that speeding?

A. No, sir.

Q. And didn't you tell Mr. Merchant, in the presence of those two men, that if the car would stay on the track, the — thing was going to make some speed?

[fol. 101] A. No, sir.

Q. Didn't you use some cuss words in referring to that car, and notify Merchant that you were going to make it highball?

A. No, sir.

Q. Are you just as positive of that statement as you are any of your testimony?

Mr. Jones: Your Honor please, we interpose the objection to the manner of argument and asking him about comparative testimony.

The Court: He is on cross examination.

By Mr. Lewis:

Q. Mr. Elzey, you are positive that you made no such statement?

A. Yes, sir.

Q. You don't even recall the conversation between you and Merchant, in the presence of two other men, at the station where the car was repaired?

A. I don't remember the two men. I remember the depot agent.

Q. Do you recall any such statement in the presence of anybody?

A. No, sir.

Q. Did you all take the car up to a saw mill at some little station to have repairs made on it?

A. We didn't take the car; we took the gas line up there.

Q. Did you go with Mr. Merchant to the mill?

A. Yes, sir.

Q. Now, at the mill, did you have a conversation with Mr. Merchant, in the presence of anybody else?

[fol. 102] A. Well, there was a fellow fixed the gas line for him, and we all talked while we were there.

Q. Didn't the agent go up there with you all?

A. I don't think he did.

Q. Will you swear that he did not?

A. No, I cannot swear that he didn't.

Q. You just don't remember who went up there with you? You don't remember whether the Agent went up there with you or not?

A. I know he was at the depot when we got back there.

Q. Well, don't you recall that the agent had been there talking, and gone to dinner, and didn't he invite you to go to dinner with him?

A. No, I don't.

Q. You don't recall being invited to go to dinner with the agent at that point?

A. No, sir.

Q. Mr. Elzey, at Singer, Louisiana, while Mr. Merchant was working on the telegraph wire connections, you had a conversation with Mr. Odle, the Agent, did you not?

A. We all talked.

Q. You all talked there?

A. Yes, sir. I told him about those fellows down there, riding with the guns. I remember that much of the conversation.

Q. Mr. Elzey, do you remember complaining that the car in question was only running on two cylinders?

A. It had not been running on any.

Q. After you got it started—That was a three cylinder car, was it not; or do you remember?

A. I don't know whether it was three cylinders or what it was.

[fol. 103] Q. Did you make any statement about doing anything to the car to increase its power and speed?

A. Nothing, only fixed that gas line.

Q. You don't recall making any suggestion to Mr. Merchant about doing something to add another cylinder to the car?

A. No, sir.

By Mr. Wilkinson:

Q. Along about that time that you had this accident, the woods were pretty full of strikers around De Quincy?

A. I don't know. That bunch on horseback that I saw was all that I saw; and they claimed to be fox hunting. That is what they told the deputy marshal.

Q. It was generally known, however, all around De Quincy there that there was a condition of restlessness prevailing about that time, among the strikers?

A. I don't know. As I told you here, that was the first trip I made down there.

Q. You heard about what was going on around the track there?

A. All I heard was that a lineman got beat up so bad that they had to bring him to the sanitarium.

Q. Had you heard of other cases of lawlessness on the part of the strikers, beating up employees of the railroad?

A. No, sir.

Q. You knew that you were going down there to guard and protect this workman against what you had heard existed?

A. Against what we had heard, but we were——

Q. And you saw these men on horseback with the guns, with the guns rather carelessly pointed towards you when you came down the track, and you told Mr. Merchant to shoot the gas?

[fol. 104] A. He had slowed down and asked what to do, and I said "Shoot the gas to it. They have not got nerve enough to shoot."

Q. He kept on going about as fast as he could to get away from those strikers?

A. Yes, sir. We went about three miles; then the gas line broke and then we pushed it about ten miles.

Q. Well, you had finished repairing the line at that time, had you not? Had you found the trouble to the line that you had gone down there with Mr. Merchant to repair? You had repaired the trouble in the line? Mr. Merchant made the repairs to the railway company's line before you had your gas pipe to go wrong?

A. Yes, sir. That was all done at the same place.

Q. You made the repairs to the railway company's line and you made the repairs to the gas tank all there at the same place?

A. Yes, sir.

Q. And after you got through with that, then you were in a hurry to catch a train to get back to Shreveport; and just had 25 minutes to catch it?

A. Yes, sir.

Q. To get to Leesville?

A. Yes, sir.

Q. Do you know how far that was?

A. No, I don't know how far it is.

Q. You discussed the matter with Mr. Merchant about getting to Leesville, or he discussed it with you?

A. Yes, he told me that the motor car would make as good time as the passenger train, and we would have 25 minutes to put it up after we got there.

Q. What did you say with reference to that?

A. I thought it was all right. I didn't know.

Q. You wanted to get to Leesville and get the car put up so you could catch that passenger train?

[fol. 105] A. I was with him, regardless of whether the car was put up or not.

Q. You two were on the same mission, you in the capacity of guard, and he in the capacity of railway lineman? You carried the gun? You had the protection?

A. Yes, sir.

Q. And he had the tools to repair the line with?

A. Yes, sir.

Q. And you both wanted to get to Leesville so you could catch a train back to Shreveport?

A. It didn't make much difference. I was going to stay with him, it didn't make any difference where he stayed or where he went.

Q. He discussed with you, however, getting back to Leesville to catch the passenger train into Shreveport?

A. We talked about it. He said that we had plenty of time; said that the car would make as good time as the passenger would.

Q. Did you tell him that suited you all right?

A. I didn't know any better.

Q. The passenger train was behind you? You both knew that?

A. Yes.

Q. You were certainly running away from the passenger train to get to Leesville?

A. He was doing the running.

Q. Well, you both had slept together in the same bed the night before and had some chance to get rather intimate, hadn't you; and discussed matters between you, when you started out, as to what you were going to do and when you were going to do it, and he didn't maintain eloquent silence all of that time?

A. No, sir.

Q. That is what I say; that you discussed together the matter of getting to Leesville and catching the train and getting to Shreveport?

[fol. 106] A. I was just risking myself in his hands while I was with him, because he knew the car and I didn't.

Q. You just left it all up to him?

A. Left that up to him, and he left the protection part up to me.

Q. The only objection you had was he was crossing the switches too fast?

A. Yes, sir.

Q. Everything else, you left it up to him?

A. Yes, sir.

Q. Outside of crossing the switches too fast, the arrangement was all right?

A. I don't know. I didn't know how fast the car would run and stay on the track, or anything about it.

Redirect examination.

By Mr. Jones:

Q. Will you please let me have the letter that you had identified and offered in evidence—copy of letter from Mr. Slentz?

Mr. Lewis: I have not offered it yet.

Mr. Jones: Well, you asked him some questions about it.

(Letter handed to Mr. Jones.)

Q. You have been interrogated about a letter which you received from Mr. S. B. Slentz, of the United States Compensation Commission, dated June 18, 1923. Did you receive another letter from Mr. Slentz at a later date with reference to the accident and your disability?

A. Yes, sir.

[fol. 107] Q. This letter was at home?

A. Yes, sir.

Q. Will you bring that in when you come in next?

A. Yes, sir.

Q. Do you recall the date of this subsequent letter that I spoke of?

A. No, sir; I don't. That was quite a little bit after I got that one; because, after I got that one they cut my compensation $33.00 a month, and so that is when I went to work seeing different doctors around, and that was the object of my being sent to New Orleans then, and after I got back from New Orleans, they put me back on total compensation.

Q. Now then, you say they put you back on total disability after that—after June 8th?

A. Yes, sir.

Q. Gentlemen, this is a letter purporting to be a duplicate, one sent to Elzey and the other to the United States Marshal here, but addressed to Mr. Elzey, under date of June 20, 1923, Is that the substance of the letter which you received and which you referred to?

A. Yes, sir; that is it.

Q. That is the time that they put you back on full compensation, total compensation?

A. Yes, sir.

Q. Now then, did your receive a letter, a copy of the letter written by the attorney of the Compensation Bureau, to Messrs. Wilkinson, Lewis & Wilkinson, Attorneys for the defendant, under date of May 20, 1924, with reference to your disability?

A. I don't remember. If I would see the letter I might remember it.

(Letter shown to witness.)

[fol. 108] A. I don't remember getting a copy of that. I might have.

Q. You don't remember whether the Commission sent you a copy or not?

A. No, sir.

Mr. Jones: Gentlemen, we call upon you to produce the original letter dated May 20, 1924—letter written by Mr. Slentz, Attorney of the Employees Compensation Bureau, under date of May 20, 1924, with reference to the estimate of the extent of the injury or liability of the compensation commission to Mr. Elzey.

Mr. Lewis: If we have it your are perfectly welcome: but we haven't got the original. We will get the copy, but we want to object to the introduction of any letters like that on the part of the plaintiff as proving his disability. The whole theory of this matter is: We went into this with the intention of proving that Elzey had made an admission to the Government that his injury did not exceed so much, and I think the evidence is only competent for that. We submit it is entirely incompetent for the plaintiff to prove his damages by letters from the Commission.

Mr. Jones: I don't want to prove his damages by the letter.

Mr. Lewis: I object to his offering it, as immaterial and irrelevant.

The Court: I think that it is admissible for the purpose of contradicting or rebutting whatever has flown from the showing made by the cross examination. Now, I am [fol. 109] rather impressed at this time, gentlemen, that whatever admission or effect might flow from matters of this sort has been largely dissipated by this man's statement, if true, that he was put on total disability; not so much affecting the question of the extent of his injury, be-

cause of the fact the statute limits the maximum which may be allowed. Of course, if he is getting the maximum, it is not much admission to show that he is getting the maximum, as affecting his right to recover against the defendant.

Mr. Jones: Here is the point——

The Court: I think it is admissible for your purpose; and that is, to rebut any showing made by the defendant upon cross-examination of this witness up to this time, to the point that he admitted, through the acceptance of any fifty-per cent allowance or otherwise, that he was not injured to the extent of total disability; and you want to also to show by this letter that the counsel for the defendant has knowledge of it through information from the Board?

Mr. Jones: It is a little more than that, if Your Honor please. You see, they estimated his disability at fifty per cent, and that fifty per cent disability had a present value of $7,377.57, don't you see?

The Court: Yes.

[fol. 110] Mr. Jones: And that would mean fifty per cent of sixty-six and two-thirds dollars a month, don't you see? That this $7,300 total disability, taking his life expectancy, which is forty years, that that $7,300 only represented an allowance of thirty-three and a third dollars a month. Don't you see what I mean.

The Court: I see.

Mr. Jones: That they got the wrong idea, don't you see?

The Court: Well, I suppose you could follow that up by an admission, couldn't you?

Mr. Jones: I think we could.

The Court: If you have that letter in your possession and it shows that this sum is calculated upon 33 1/3% basis, why then that is just a matter of referring to the mortuary tables. I suggest that you postpone the matter until you see whether you have got that letter.

Mr. Jones: In the meantime, if Your Honor will restrict this evidence to the purpose to which Your Honor says it is admissible—I don't want to prove disability in that manner.

The Court: It is not admissible for the purpose of showing disability; it is simply admissible for the purpose of [fol. 111] rebutting the defendant's showing of admission

on the part of plaintiff. Plaintiff can rebut whatever proof the defendant offered. I think, if this letter discloses anything of that sort, he is entitled to offer it. We will postpone the matter until you get the letter and see, gentlemen. All right, let's go ahead.

By Mr. Jones:

Q. This message received about going to De Quincy, you say that was from a deputy marshal down at De Quincy, I believe you said?

A. I don't think he was at De Quincy. He was at a little stop out this side of De Quincy. He had these men there and wanted me to come back and identify them.

Q. Now, I didn't catch the time that you were in the army. Nearly two years, but what period of time did it cover? To about what time?

A. From July 26th, 1917 to July—to about June 28th, 1919.

Q. Nearly two years?

A. Yes, sir.

Q. You went in a little early and came out a little late?

A. Yes, sir.

Q. Of course, during that time, you were not working.

A. No, sir.

Q. You were simply in the service of the Government as a soldier?

A. Yes, sir.

Q. In this country, or in France, or what?

A. I spent eleven months in this country, and twelve months over seas.

[fol. 112] Q. Then, after you got out of the Army, you went back to your same work, day labor, manual labor?

A. Yes, sir.

Q. Having done no other kind of work than manual labor, save while you were in the army, you went back to the same kind of work. That is all you know how to do?

A. That is all.

Q. During the time that you were in the army, you did manual labor, but you didn't fix the price for it?

A. No, sir.

Q. You spoke about the amount that you have got for arresting these speeders. When you first started in out there, how was business?

A. Business was fine. The first day I caught nine, and the next day I caught seventeen, and the next day eight. The first month, I had 78 arrests, in the first month; in the first fifteen days.

Q. Had you ever done speed cop duty before?

A. No, sir. I was the first one that they put on.

Q. You must have arrested everybody that went through Cedar Grove?

A. Pretty nearly all.

Q. Then, after that, how was business?

A. Business has fell off. I don't average a man a day now. I have not caught a man since yesterday a week ago.

Q. In other words, you wised them up that there was a speed ordinance?

A. Yes, sir.

Q. I guess nobody speeds through there now except escaping bootleggers?

A. That is all.

Q. How long did you say that you had been using the City's car?

[fol. 113] A. About, little over a month.

Q. Prior to that time, you used your own car?

A. My own private car; yes, sir.

Q. Who furnished the gasoline?

A. The town furnished the gasoline ordinarily, and paid the repair bills on the car.

Recross-examination.

By Mr. Wilkinson:

Q. You stated that you went through the ninth grade in school?

A. Yes, sir.

Q. You studied Algebra?

A. Yes, sir.

Q. Geography and history and arithmetic?

A. Yes, sir.

Q. Did you study any book-keeping or anything like that, in school?

A. No, sir. I took six weeks course in telegraphy once. I took that extra.

Q. You have had enough education to be able to master a course in telegraphy, if you carried it through and wanted to enter that trade, have you not?

A. Yes; I ought to be able to.

Q. And telegraph operators get pretty good pay?

A. I don't know what they get paid for.

Q. You have had enough education—You read and write, and know how to add and subtract, multiply and divide with reasonable accuracy, don't you?

A. All but the writing; I cannot write very well.

Q. You cannot write very plainly, but you can write a letter and know how to spell?

A. Yes, sir.

[fol. 114] Q. And know how to frame sentences?

A. Yes, sir.

Q. You had enough education to be able to take a business course in book-keeping or stenography, haven't you?

A. Well, yes; but it is hard to get a job without knowing all these things; unless you have a high school education. That is about the first thing that ask you.

Q. You don't have to have a high school education to take a business course?

A. Not for you to take it, but to get a job, you very nearly have to have it.

Q. Now, about your working; you were getting $150.00 a month, employed as a deputy marshal?

A. Yes, sir.

Q. That position was understood by you to be a temporary appointment during the existence of the railway strike, wasn't it?

A. No, sir; they didn't say.

Q. Well, you knew that that was what you were employed for, was to guard railroad property?

A. I don't know. They swore me in as a United States deputy Marshal, and told me whatever come my way why I would get it. And they told me to go on back home and they would call me when they wanted me. I went back home, and in a couple of hours they called me and sent me to the Kansas City Southern.

Q. Your duties were all in connection with the railroad.

A. Yes, sir.

Q. You didn't do anything else in the Marshal's office in the way of serving civil process or in the way of prohibition matters and things of that kind?

A. No, sir.

[fol. 115] Q. Now, it was all confined to the railroad business, in connection with the strike?

A. Yes, sir.

Q. Guarding railroad property?

A. Yes, sir.

Q. Now, just before you were employed by Mr. Page, I believe you said that you were just knocking about from pillow to post, one job and then another?

A. Yes, sir.

Q. That you painted a house at $6.00 a day—painted a a church?

A. Yes, sir.

Q. How long did it take you to paint that church?

A. Little over a week. I had to put three coats on it, inside and out.

Q. And before you painted that church, what were you doing?

A. Just picking up jobs here and yonder.

Q. What kind of jobs?

A. Anything I could get.

Q. That is what I want to get at, is how much you did get?

A. I was kept pretty busy. Of course, I got better paid at some time than others.

Q. Do you have any idea what your average earnings were?

A. No, sir.

Q. Six dollars a day for a week there painting the church. That was in what year, 1922?

A. Yes.

Q. That was just before you went in the Marshal's office?

A. Yes, sir.

Q. Well, it was a little hard to get a job then, was it not?

[fol. 116] A. Yes, right then it was. I could have gone back to the oil fields and got work, but I had a family I could not take to the oil fields.

Q. You would not say that you averaged five dollars a day on those jobs, would you?

A. Well, yes; an average of four or five dollars a day.

Q. Did you get any better jobs than that of painting the church at six dollars a day?

A. No, but then, four or five dollars a day was the standard wage.

Q. Then whenever you got a job, it was generally four or five dollars a day?

A. Yes, sir.

Q. But you were not working every day?

A. Sometimes I got more than four or five dollars.

Q. Well, when did you get more besides painting on that church?

Q. Well, I don't know. I cannot remember all of that.

Q. You cannot name any instance when you got any more than five dollars?

A. Yes, me and a fellow contracted to cover some houses out here, and I made as high as $12.00 a day, and he made twenty.

Q. Covering a house?

A. No, shingling a house.

Q. And just prior to that period of time was when you were in the grocery business and didn't make anything?

A. No, sir; didn't make anything.

Q. And lost a lot on that. When you were in the oil fields, what did you get there?

A. When I got out of the army I went to work working derricks, and made $9.00 a day at Burke Burnette, Texas. I got there in July and left along in February of the next [fol. 117] year. Worked every day at $9.00 a day. I went up in Oklahoma and got the same price up there; and I went from there to Old Mexico, and got five hundred dollars and expenses there as Manager, in Old Mexico.

Q. Immediately preceding your employment by the Marshal, you say you had no regular job?

A. No, sir. I could have gone back to the oil fields.

Mr. Wilkinson: That is all.

(Witness excused.)

Thereupon the following depositions were offered in evidence by the plaintiff, and read to the jury:

R. J. Evans (Deposition)

By Mr. Jones:

Q. What is your name, age, residence and occupation?

A. R. J. Evans is my name. My age is thirty five years at my last birthday. My residence is near Rosepine, Louisiana, common laborer.

Q. On or about the 10th of August, 1922, where did you reside with reference to the town of Rosepine, Louisiana, and where was your home located with reference to the tracks of the Kansas City Southern Railway Company?

A. On or about the 10th day of August, 1922, I was living where I am now living, about one fourth of a mile North of Rosepine, Louisiana. My house is located about one fourth of a mile east of the track of Kansas City Southern Railroad Track.

[fol. 118] Q. You are being called upon to give evidence in a case in which R. E. Elzy sues the Kansas City Southern Railway Company as the result of the injuries sustained by him on or about the 10th of August, 1922, as the result of a wreck of a motor car on which he was riding near the town of Rosepine, Louisiana, on or about the 10th of August, 1922.

A. I understand that is the object of this examination.

Q. State whether or not you recall the circumstances of a wreck of a motor car in which a man by the name of R. E. Elzey sustained injuries on or about the 10th of August, 1922, near the town of Rosepine, Louisiana?

A. Yes, I recall the circumstances of the wreck of a motor car on or about the 10th day of August, 1922, near Rosepine, Louisiana.

Q. If you answer that you recall the circumstances of the wreck of a motor car on or about the 10th of August, 1922, near the town of Rosepine, Louisiana, in which wreck a man by the name of R. E. Elzey sustained injuries, did you see the motor car prior to the wreck, and if you did, when was it with reference to the time of the wreck?

A. Yes, I saw the motor car just prior to the time of the wreck; the time was very short before I heard the noise made from the wreck.

Q. If you answer that you saw the motor car just prior to the wreck, where were you and where was the car, and in what direction was the car going?

A. I was on the tracks of the Kansas City Southern Railroad track, walking in the direction of Rosepine Depot, and stepped off to let the motor car pass. I was something like four hundred yards from the Depot at Rosepine, Louisiana. The motor car was going North.

[fol. 119] Q. If you answer that you saw the motor car prior to the wreck, state whether or not it was running fast or slow, and what was its approximate rate of speed?

A. At the time the motor car passed me, it was running very fast. I think it was running at a speed of forty or fifty miles per hour.

Q. If you answer that you saw the motor car just prior to the wreck, was there anything about the condition of the car that attracted your attention, and if so, what was it.

A. I noticed as the motor car passed me that the rear end of the car was wabbling.

Q. If you answer that you noticed anything about the car, what was it, and what was the cause of it, and where was it?

A. I noticed that the motor car was wabbling. I do not know the cause of it. It was at the time the motor car passed me and the place it passed me.

Q. If you answer that you saw the car, where was the wreck approximately, with reference to the last place you saw the car?

A. From the point where the motor car passed me, it was a little over one half of a mile to the place where the wreck occurred.

Q. Did you go to the scene of the wreck?

A. Yes, I went to the scene of the wreck.

Q. If you answer that you went to the scene of the wreck, did you see R. E. Ellzey, and if so, where was he, what was he doing, and what was his condition?

A. When I got to the wreck I saw a man the others told me was R. E. Ellzey. He was lying on the ground and one of his legs were broken.

Q. If you answer that you went to the wreck, looking from the place of the wreck to the station of Rosepine, [fol. 120] Louisiana, was it up or down-grade, and what was the character of the grade, and what kind of grade?

A. From the point where the motor car was wrecked, looking in the direction of Rosepine, it is up grade. I regard it as very steep grade.

Q. If you answer that it was up-grade, was it a steep up-grade or a gradual up-grade?

A. I regard it as a very steep up grade, going in the direction towards Rosepine, Louisiana, from where the wreck occurred.

Q. How long, approximately, did you stay at the scene of the wreck?

A. I remained at the place where the wreck occurred only a very short time.

Q. When you left the scene of the wreck, had R. E. Ellzey left, or was he still there?

A. The man pointed out to me as R. E. Ellzey, and the man whose leg was broke, was there when I left the scene of the wreck.

Q. If you state that you stayed at the scene of the wreck until R. E. Ellzey left, how did he leave?

A. I was not at the scene of the wreck when Mr. Ellzey was removed.

Q. If you state that R. E. Ellzey was removed from the wreck, how was he removed, and where was he taken, if you know, or in what direction was he taken with reference to the direction of Shreveport, Louisiana, or De Ridder, Louisiana, and on what was he taken?

A. I was not present when Mr. Ellzey was removed from the place of the wreck.

Q. When you reached the scene of the wreck, where was the motor car and where was Ellzey with reference to the motor car, and if the motor car was off the track, on which [fol. 121] side of the track was it, and on which side of the track was R. E. Ellzey, and where was the motor car with

reference to where R. E. Ellzey was; was it ahead of where R. E. Ellzey was or behind where he was?

A. When I reached the scene of the wreck, the motor car was off the track and about seven or eight feet from the track, and on the east side of the track. Mr. Ellzey was lying on the ground about ten or twelve feet from the motor car, and the same side of the track the motor car was on. The motor car was south of where Mr. Ellzey was lying.

Q. If you have stated that R. E. Ellzey was taken from the scene of the wreck on a passenger train, where did the engine of the passenger train that picked him up stop, with reference to the place where the motor car was—that is, did the engine of the passenger train stop before reaching the place where the motor car was off the track, or did it pass the place where the motor car was off the track?

A. I was not present when Mr. Ellzey was removed from the scene of the wreck.

Q. If there had been any obstruction on the track could and would you have seen it?

A. If there had been any obstruction on the tracks of the Railroad I would have seen it, but I never saw any obstruction on the tracks.

Q. Did you see any obstruction on the track?

A. I did not.

Q. At the place where the wreck occurred, which direction does the railroad track run—that is, which direction is Shreveport from the scene of the wreck, and which direction is De Ridder, Louisiana, from the scene of the wreck?

A. North and South, Shreveport, Louisiana is north and De Ridder, Louisiana, is south.

[fol. 122] Q. If you answer that you went to the scene of the wreck and found R. E. Ellzey, in what condition did you find him?

A. When I arrived at the wreck, I found Mr. Ellzey lying on the ground with a broken leg.

Q. If you state that you noticed any wounds on R. E. Ellzey, what caused you, or how came you to notice them, and what did you see?

A. I noticed that Mr. Ellzey was lying on the ground, and I noticed that his leg was broke, and I noticed that the bone of his leg was sticking out through his pant leg.

Cross-interrogatories:

Q. Is it not a fact, and have you not already sworn to an affidavit stating that the track at the place of the accident was in good condition, and that you did not see any obstruction on the track?

A. Yes, it is true.

MRS. ZELA SMITH (Deposition)

Q. What is your name, age, residence and occupation?

A. My name is Zela Smith. My age is now thirty-five years. My residence is Ludington, Louisiana. My occupation is a housekeeper.

Q. On or about the 10th of August, 1922, where did you reside with reference to the town of Rosepine, Louisiana, and where was your home located with reference to the tracks of the Kansas City Southern Railway Company?

A. On or about the 10th day of August, 1922, I was living at Rosepine, Louisiana. My residence was located near [fol. 123] the track of the Kansas City Southern Railroad tracks.

Q. You are being called upon to give evidence in a case in which R. E. Elzey sues the Kansas City Southern Railway Company as the result of the injuries sustained by him on or about the 10th of August, 1922, as the result of a wreck of a motor car on which he was riding near the town of Rosepine, Louisiana, on or about the 10th of August, 1922.

A. I remember that there was a wreck of a motor car on the Kansas City Southern on or about the 10th day of August, 1922.

Q. State whether or not you recall the circumstance of a wreck of a motor car on or about the 10th of August, 1922, near the town of Rosepine, Louisiana?

A. I remember the wreck of a motor car on the Kansas City Southern Railroad on or about the 10th day of August, 1922.

Q. If you have answered that you recall the circumstances of a wreck of a motor car near the town of Rosepine, Louisiana, on or about the 10th of August, 1922, state

whether or not you saw the car just before it was wrecked, and if so, where?

A. Yes, I saw the motor car a very short time before the wreck, about two minutes before I heard the noise made by the wreck of the motor car.

Q. If you have stated that you saw the motor car pass your home just before the wreck, state whether or not you saw anything unusual relative to the car as it passed your home?

A. I saw nothing unusual about the motor car, except it was running at very high speed.

Q. If you have stated that you saw the motor car just prior to the wreck as it passed your home, state whether or not it was being driven fast or slow?

[fol. 124] A. At the time I saw the motor car when passing my home, the motor car was running at a very high speed.

Q. If you have answered that you saw the motor car just before the wreck and stated that it was going fast, how was it traveling in comparison with other motor cars that you had seen pass there before?

A. The motor car that passed my house, just before the wreck, was running at a very high speed, faster than any motor car that I had ever noticed running past my house.

Q. What was the approximate rate of speed at which the car was being driven when you saw it last?

A. I am unable to approximate the speed of car, and the only thing I know was that the car was running at a very high speed when I saw it pass out of my sight.

Q. Was there anything connected with the motor car that attracted your attention, and if so, what was it?

A. The only thing about the motor car that attracted my attention was the speed at which it was running, as it passed my house. I never saw a motor car being driven so fast as that one was at the time it passed my house.

Q. What was the approximate rate of speed at which the motor car was being driven, if you know?

A. I am unable to approximate the speed of the car. The car was running very fast.

Q. What was the approximate distance from where you last saw the motor car and the place where it was wrecked?

A. The motor car had attracted my attention by the way it was being driven, and I looked at it until it entered the cut, which cut is about one hundred yards from where I was standing.

[fol. 125] Q. State whether or not there was anything unusual about the motor car as it passed your house that directed your attention to it, and if so, what was it?

A. The only thing about the motor car that attracted my attention was the high speed at which it was running.

WALLACE SMITH (Deposition)

Q. What is your name, age, residence and occupation?

A. Wallace Smith is my name. My age is about thirty years. My residence is Ludington, Louisiana. My occupation is pipe fitter.

Q. On or about the 10th day of August, 1922, where did you reside with reference to the town of Rosepine, Louisiana, and where was your home located with reference to the tracks of the Kansas City Southern Railway?

A. On or about August 10th, 1922, I was living about one hundred and fifty yards from the depot at Rosepine, Louisiana. My home was located west of the Kansas City Southern Railroad.

Q. You are being called upon to give evidence in a case in which R. E. Ellzey sues the Kansas City Southern Railway Company as the result of the injuries sustained by him on or about the 10th of August, 1922, as the result of a wreck of a motor car on which he was riding near the town of Rosepine, Louisiana, on or about the 10th of August, 1922.

A. I remember that on or about the 10th day of August, 1922, that there was a wreck of a motor car a short distance north of Rosepine.

Q. State whether or not you recall the circumstance of the wreck of a motor car on or about the 10th of August, 1922, near the town of Rosepine, Louisiana, in which wreck, one R. E. Ellzey was injured?

[fol. 126] A. I remember that there was a wreck on or about the 10th day of August, 1922, of a motor car on the Kansas City Southern Railway just north of Rosepine,

Louisiana, and I saw a man whose leg was broken but I did not learn his name.

Q. If you state that you recall the circumstance of the wreck to the motor car on or about the 10th of August, 1922, near the town of Rosepine, Louisiana, in which wreck R. E. Ellzey was injured, state whether or not you saw the motor car just prior to the wreck and where was it when you saw it, and where were you, and in which direction was the car going?

A. On the day of the wreck of the motor car on the Kansas City Southern Railway, on or about the 10th day of August, 1922, I was standing at the depot in Resepine, Louisiana, and I saw the motor car going north a very few minutes before the wreck. The motor car was on the track of the Kansas City Southern Railway when I first saw it a little south of the depot. I was standing at the depot and the car was going north.

Q. If you have answered that you saw the motor car, and that it passed you near Rosepine, Louisiana, how was it traveling with reference to its traveling fast or slow?

A. When the motor car passed me it was going very fast.

Q. If you have answered that the motor car was traveling fast, approximately at what rate of speed was it traveling?

A. The motor car was running at a speed of about forty or fifty miles an hour.

Q. Who was driving the motor car when it passed you? Give a description of the man.

[fol. 127] A. I don't know who was driving the motor car when it passed me; on account of the speed of the car I am unable to give a description of the man who was driving it.

Q. Did you go to the wreck after it occurred?

A. Yes.

Q. If you state that you went to the place where the wreck occurred, state whether or not you saw R. E. Ellzey there, and if so, in what condition did you find him?

A. When I arrived at the place where the wreck occurred, I saw a man lying on the ground with his leg broken. I was afterwards informed that his name was R. E. Elzey.

Q. If you state that you went to the wreck, where was the motor car, and where was R. E. Ellzey?

A. When I arrived at the wreck the motor car was standing on the East side of the track a short distance from the track, and R. E. Ellzey was lying on the ground ten or twelve feet from the track.

Q. If you state that you went to the wreck and saw R. E. Ellzey, what was his condition, and if injured, what was the nature and character of his injuries?

A. When I arrived at the place of the wreck, I saw R. E. Ellzey lying in the ground, his leg was broken and the bone was sticking through his pants' leg and I noticed there was dirt on the end of the bone.

Q. Where was the motor car with reference to the track, and where was R. E. Ellzey, with reference to the track?

A. The motor car was on the East side, a few feet from the track, and Mr. R. E. Ellzey was on the East side of the track, ten or twelve feet from the track.

[fol. 128] Q. When you reached the scene of the wreck, was R. E. Ellzey there, or had he gone away. If so, how did he go?

A. When I reached the scene of the wreck, Mr. Ellzey was there.

Q. If you state that you stayed at the scene of the wreck until R. E. Ellzey was removed, how was he removed and where was he taken?

A. I was present when Mr. Ellzey was removed. He was placed on a passenger train in the rear coach of a train that was going North. I do not know to what place he was carried.

Q. If there had been any obstruction on the track, could and would you have seen it?

A. I think I would have seen it.

Q. Did you see any obstruction on the track?

A. No.

Q. If you have answered that R. E. Ellzey was removed by a passenger train coming to the scene of the wreck and picking him up, where did the engine of the train stop with reference to the place where the motor car was. That is, did it stop towards Rosepine, Louisiana, from the motor car, or towards Shreveport from the motor car?

A. The passenger train that picked Mr. Ellzey up was going North, and the engine and all the coaches passed the point where the wreck occurred except the last coach and

this was stopped about opposite where Mr. Ellzey was lying. The train, when stopped to pick up Mr. Ellzey, was between the point of the wreck and Shreveport, Louisiana.

Q. Did the engine stop before it reached the place where the motor car was, or did it stop beyond where the motor car was?

[fol. 129] A. Yes, the train was brought to a stop a short distance before it arrived at the place of the wreck and then started up and the engine and all the coaches except the rear coach passed the place where the wreck occurred when again it come to a stop.

Q. State whether or not if there had been anything on the track that could have caused the motor car to leave the track, you could and would have seen it?

A. If there had been anything on the track to cause the wreck, I did not see it. If there had been anything on the track I would have seen it.

Cross-interrogatories:

Q. Is it not a fact that you have already sworn to an affidavit stating that you found nothing on the track that would have caused the wreck?

A. Yes. Yes, I examined the flanges of the wheels at the time and I found nothing wrong with them.

Q. Is it not a fact that you have already sworn that you personally looked at the flanges of the wheels of the motor car and found nothing wrong, and that you looked at said wheels at the time and on the day of the wreck?

A. Yes, I examined the flanges of the wheels at the time and I found nothing wrong with them.

Q. Have you not already sworn that you did not notice anything unusual in the running of the motor car?

A. I have stated heretofore under oath that I saw nothing unusual about the running of the motor car except the speed at which it was running as it passed me.

]fol. 130] JOHN EVANS (Deposition)

Q. What is your name, age residence and occupation?

A. My name is John Evans. My age is sixty years at

my last birthday. I live at Rosepine, Louisiana, and my occupation is that of a farmer.

Q. On or about the 10th of August, 1922, where did you reside with reference to the town of Rosepine, Louisiana, and where was your home located with reference to the tracks of the Kansas City Southern Railway Company?

A. On or about the 10th day of August, 1922, I was living at my home about one half mile north of Rosepine, Louisiana. My residence is located about one hundred feet from the railroad track.

Q. You are being called upon to give evidence in a case in which R. E. Ellzey sues the Kansas City Southern Railway Company as the result of the injuries sustained by him on or about the 10th of August, 1922, as the result of a wreck of a motor car on which he was riding near the town of Rosepine, Louisiana, on or about the 10th of August, 1922.

A. I know that there was a wreck of a motor car near Rosepine on or about the 10th day of August, 1922.

Q. State whether or not you recall the circumstances of a wreck of a motor car on or about the 10th of August, 1922, near the town of Rosepine, Louisiana?

A. I remember that there was a wreck of a motor car just north of Rosepine on or about the 10th day of August, 1922.

Q. If you state that you recall the wreck of the motor car near the town of Rosepine, Louisiana, on or about the 10th of August, 1922, state whether or not you went to the scene of the wreck, and if so, what caused you to go there? [fol. 131] A. I went to the scene of the wreck of the motor car as I heard the noise from the wreck and saw a man coming back in the direction of Rosepine, La., he the man, was coming fast.

Q. If you have answered that you went to the wreck, what condition did you find there, and who did you find, and in what condition was the person or persons whom you found there, and where was the motor car, was it on or off the track, and if off the track, where, and if on the track, where?

A. I found the motor car off the track, and a man lying on the ground with a broken leg. The motor car was lying about six or eight feet from the track. I saw the follow-

ing persons there that I knew: R. J. Evans, Wallace Smith, Bert Davis and one man I did not know.

Q. If you state that you went to the wreck of the motor car on or about the 10th of August, 1922, where was it relative to the station of Rosepine, Louisiana?

A. The wreck of the motor car was about three quarters of a mile from the station or depot at Rosepine, Louisiana, and North of the Town.

Q. If you state that you went to the wreck of the motor car, near Rosepine, Louisiana, on or about the 10th of August, 1922, and found the car off the track, what was the condition of the roadbed or track in the direction of Rosepine, Louisiana, from where you found the motor car, relative to it being upgrade or downgrade, and what was the character of the grade?

A. At the place I found the motor car north of Rosepine, I did not examine the track or road bed back in the direction of Rosepine, La. The grade from where the motor car was wrecked, going in the direction of Rosepine, is a grade. I would call a heavy grade. The grade starts some [fol. 132] distance north of the station at Rosepine, and is a down grade to the point where the wreck occurred.

Q. If you have answered that it was up-grade in the direction of Rosepine, Louisiana, was it a steep up-grade or gradual up-grade, a long or short up-grade? Describe it fully?

A. The grade from where the motor car was wrecked going in the direction of Rosepine, is a steep up grade for a part of the way in the direction of Rosepine, Louisiana. The grade at this place is in a cut.

Q. If you have stated that you went to the wreck on or about the 10th of August, 1922, of the motor car, near Rosepine, Louisiana, about what hour of the day was it that you went there?

A. The time of day that I went to the point where the motor car was wrecked, was between twelve and one o'clock of the day.

Q. If you have stated that on or about the 10th of August, 1922, you went to a place where a motor car was wrecked near Rosepine, Louisiana, state whether or not you found anybody there, and if so, who, and what was the condition

of the person you found, relative to his being injured or not injured, and if injured, what were the nature and character of the injuries you found on the person, if any?

A. At the time I went to the wreck of the motor car, on or about the 10th day of August, 1922, I found R. J. Evans, Wallace Smith, Bert Davis and a man who I did not know. I found one man lying on the ground with his leg broke.

Q. If there had been any obstruction on the track, could and would you have seen it?

A. I did not see any obstruction on the track, if there had been any obstruction on the track, I think I would have seen it.

[fol. 133] Q. Did you see any obstruction on the track?

A. I did not see any obstruction on the track.

Q. If you have stated that you found R. E. Ellzey in an injured condition, where the wreck occurred, state whether or not he was taken away from the place, and if so, how?

A. I found a man at the place where the motor car was wrecked. I did not know his name, but was informed by others his name was R. E. Ellzey. He was placed aboard of the north bound passenger train. This was the last I saw of him.

Q. If you have answered that he was taken away by a railroad train, what train was it, and where did the train stop with reference to where the motor car was wrecked and where R. E. Ellzey was?

A. The passenger train that Mr. Ellzey was placed on was stopped at a point just north of the point where the wreck occurred.

Q. If you have stated that R. E. Ellzey was taken away on a train where did the engine of the train stop with reference to the place where you found the motor car off the track—that is, state whether or not the engine stopped before it reached the place where the motor car was off the track, or whether it stopped after passing the place where the motor car was, in the direction of Shreveport?

A. The engine of the passenger train that Mr. Ellzey was placed on was standing north of the point where the motor car was wrecked and lying, several car lengths.

Q. State what character of injuries you observed, if any, on R. E. Ellzey, and how and where was he injured, and

what did you see about his injuries, and where was he relative to the track?

[fol. 134] A. Mr. Ellzey's leg was broken. I noticed the bone of his leg was sticking out through his pant leg. He was lying seven or eight feet from the railroad track.

Cross-interrogatories:

Q. Why did you go to the wreck?

A. I went because I heard the noise of the wreck, and saw a man coming from that direction, and he was moving in a hurry in the direction of depot at Rosepine.

Q. Please state how much of a grade it was, if possible, in degrees?

A. I consider the grade at the place approaching the point where the wreck occurred a heavy grade. I am unable to give the degree.

Q. Have you not already sworn to an affidavit stating that you did not see any obstructions on the track?

A. Yes.

D. M. Kimball (Deposition)

Q. What is your name, age, residence and occupation?

A. Name, D. M. Kimball; age, 25 years; residence, De Quincy, Louisiana; occupation, laborer.

Q. Where did you reside and what was your occupation on or about the 10th of August, 1922?

A. Residence at De Quincy, Louisiana; occupation, was a section hand on Kansas City Southern Railway, Section 103.

Q. You are being called upon to give evidence in a case in which R. E. Ellzey sues the Kansas City Southern Railway Company as the result of the injuries sustained by him on or about the 10th of August, 1922, as the result of a wreck of a motor car on which he was riding near the [fol. 135] town of Rosepine, Louisiana, on or about the 10th of August, 1922.

A. This interrogatory is a statement of fact and needs no answer.

Q. If you answer that you were a section-hand on or about the 10th of August, 1922, on what road were you a

section-hand on what section, and who was your section foreman?

A. I was on Section 103 of Kansas City Southern Railway and W. M. James was foreman.

Q. State whether or not you learned of R. E. Ellzey, the plaintiff herein, having been injured by reason of a motor car on which he was riding, leaving the track near Rosepine, Louisiana, on or about the 10th of August, 1922?

A. Yes, I heard about it.

Q. State whether or not you saw R. E. Ellzey on or about the 10th of August, 1922, leave De Quincy on the date of the wreck, and if so, in which direction did he go on leaving, and with whom did he go, and approximately at what hour of the day?

A. Yes, I saw R. E. Ellzey and a man by the name of Merchant leave De Quincy on that date, between seven and eight o'clock in the morning, on a motor car, they went in the direction of De Ridder.

Q. If you state that you saw R. E. Ellzey, and a man by the name of Merchant leave De Quincy, Louisiana, on the day on which you learned that R. E. Ellzey was injured by the wreck of a motor car, state whether they left in the direction of De Ridder and Shreveport, Louisiana?

A. Yes, they went north, in the direction of De Ridder.

Q. If you have answered that Merchant and R. E. Ellzey left De Quincy, Louisiana, in the direction of De Ridder, [fol. 136] and Shreveport, Louisiana, on the day on which you learned that R. E. Ellzey was injured, which one of them was operating the car?

A. Merchant was operating the car.

Q. If you state that you saw R. E. Ellzey and a man by the name of Merchant leave on a motor car in the direction of De Ridder and Shreveport, Louisiana, on or about the 10th of August, 1922, state whether or not anybody said anything to Merchant relative to the manner in which the car should be driven, and its condition, and if so, who was the man, and what did he say?

A. Mr. James told Mr. Merchant that he had better not over speed the car, referring to the motor car Merchant and Ellzey were going in.

Q. If you have answered that the Section Foreman, James, said something to the man who was driving the

car, where was he when he spoke to him, and what did he tell him with reference to the car and the manner in which it should be driven, and what reason did he give for whatever statement he made relative to the manner in which the car should be driven?

A. Mr. James was standing on the platform about eight or ten feet from the car, and Mr. Merchant was standing behind the car, when Mr. James told Mr. Merchant that he had better not overspeed the car; they were talking about the car, but I do not know all that was said. This conversation took place in front of the tool house on the Kansas City Southern Railway, on the morning Merchant and Ellzey left.

Q. Did you ever ride on the motor car on which R. E. Ellzey and Merchant left De Quincy, Louisiana, on the morning on which you learned that the car was wrecked, and R. E. Ellzey injured prior to this time, and if you state that you had, what was the condition of the car, and [fol. 137] about how long before the wreck was it that you had last ridden on it?

A. I rode on the same car a few days before that day, and when it got to going about 20 miles an hour, the back would wobble. They call it fighting the rails. I do not know what caused it to wobble.

Q. If you answer that you had ridden on the motor car on which R. E. Ellzey and Merchant were riding on the date the car was wrecked, state whether or not there was anything the matter with the car, and what was it and if you know, what was it due to?

A. All I know is that it wobbled, but do not know what caused it to wobble.

Q. If you answer that there was a wobble in the rear of the car, when it was driven, state what this was due to, if you know?

A. I do not know what caused it to wobble.

Q. What was the condition of the flanges or any flange of this motor car, and of the axles?

A. I do not know.

Q. If you have answered that any of the flanges of this motor car were sharp, which one or ones?

A. I do not know whether they were sharp or not.

Q. Was it or not generally known that there was a sharp rear flange on this car?

A. I do not know.

Q. State whether or not it was generally known by those who used the motor car on which R. E. Ellzey sustained his injury that it could not be driven fast on account of a sharp rear flange?

A. I do not know.

[fol. 138] Cross-interrogatories:

Q. How long did you observe the motor car after it left De Quincy? Do you know who was operating the motor car after it left De Quincy?

A. I just watched it until it got about 100 yards away. Mr. Merchant was operating it when they started off, but I do not know how long he operated it. He operated it as far as I saw them.

Q. Was not Ellzey with Merchant at the time?

A. Yes, they left together on the car.

Q. Do you know whether or not the motor car had been repaired since you rode on it, if you testify that you did so ride on it?

A. No.

Q. Please state the source of your knowledge?

A. I answer to direct interrogatories No. 14 and 15, I answered that I did not know.

Q. Have you not already testified under oath to the effect that you did not know what caused the car to wobble?

A. Yes.

Q. Have you not already made an affidavit to the effect that you did not know what condition the car was in just preceding the accident?

A. Yes.

Q. If you have stated above that the flanges or wheels of the motor car were defective, please state why you made an affidavit to the effect that you did not know whether the car was in good condition or not?

A. I have not answered that I know the wheels were defective. I do not know anything about the wheels.

Q. Do you know Sol Jones, one of counsel for plaintiff herein? If so, how long have you known him? When did you last see him or anyone employed by him?

[fol. 139] A. I do not know Sol Jones. Some lawyer came out to the plant where I was working last August, and talked to me about Ellzey's accident, but I do not know who he was. He is the only lawyer that has talked to me about this case, except the Railroad lawyer.

Dr. R. E. Ellzey, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Jones:

Q. Doctor, you gave the stenographer your initials, I believe—R. E. Ellzey?

A. Yes, sir.

Q. You are a regular practicing physician in Shreveport?

A. Cedar Grove, yes, sir.

Q. How long have you been in the general practice of medicine?

A. Well, I finished in 1913, and have practiced since then.

Q. You have been practicing regularly since your graduation?

—. ——.

A. What school of medicine are you a graduate of?

A. Memphis Hospital, Medical Department.

Q. Do you know R. E. Ellzey, plaintiff in this case?

A. Yes, sir.

Q. Related to you?

A. Yes, sir.

Q. What relation?

A. First cousin.

Q. Do you remember the circumstance of his being injured down on the Kansas City Southern Railway in August, 1922?

[fol. 140] A. Yes, sir.

Q. It appears, Doctor, that Mr. Ellzey must have been injured about the tenth of August, 1922. Do you recall when you first saw him after the injury?

A. It was on the 11th, about 11 o'clock.

Q. What were the circumstances under which you saw him?

A. Well, they had called me from below early in the evening, about six o'clock or five-thirty——

The Court: Speak a little louder.

A. I say, they called me from below, wherever he was hurt, about five-thirty in the evening; to be at the Schumpert Sanitarium by the time that that six o'clock train got to Shreveport.

The Court: Doctor, will you please remove the gum from your mouth?

Witness: Yes, sir. (Witness removes gum.)

A. But I had a case that I was tied up with and could not get over there that evening. And they also phoned me from the Sanitarium after they had gotten him here that night, that they wanted me to come over and see him. But I was tied up with this case and could not leave; and I told them to go ahead; that he would be under the railroad doctor's care anyway, and I would not be permitted, I didn't suppose, to have anything to do with it. So I didn't get over until the next morning about eleven o'clock; and I helped set his leg about eleven o'clock next day.

[fol. 141] Q. Who set his leg?

A. Dr. Walke and myself and Dr. Quinn.

Q. Doctor Ellzey, were you there when they removed the bandage from his leg?

A. Yes, sir.

Q. What condition was his leg in when the bandage was removed?

A. Well, there was this shaft to the tibia or large bone.

Q. Between the knee and the ankle?

A. Was fractured somewhere about half way between the knee and the ankle, and the shaft was sticking on the outside of the leg halfway down to the ankle.

Q. Down to the ankle?

A. Yes, sir.

Q. About six or seven inches of bone exposed there?

A. Well, I reckon four or five inches.

Q. Did you notice any foreign substance on that bone?

A. Yes, sir; there was pine straw grass, bitter weed heads and dirt.

Q. Did the leg show any evidence of having been cleansed prior to the time that you saw it?

A. No, sir.

Q. Well, in setting the leg, was the bone and parts cleansed out?

A. Well, fairly well.

Q. It was given the regulation treatment, then, in the setting?

A. Yes, sir.

Q. Which consisted, I suppose, in cleansing the wound as best you could, and cleansing the bone and readjusting the bone in position, and putting on the splint?

A. Yes, sir.

[fol. 142] Q. Is that correct?

A. Yes, sir.

Q. Under whose treatment was he at that time, Doctor?

A. Doctor Walke.

Q. Doctor Walke was the physician for the railroad?

A. Why, I suppose that he was. I don't know that he was, but that was my understanding that he was.

Q. After that, under whose treatment was he?

A. Well, he was under Doctor Walker's for, I don't know; eight or ten weeks; something like that.

Q. Did you call Doctors Willis, Garrett and Willis, Doctor, to doctor on him some ten weeks later?

A. Yes, sir.

Q. Were you present at the operation?

A. Yes, sir.

Q. What was the condition of the leg at that time?

A. Well, it was—pus had formed from the knee down into the heel, all the way around; and they opened it and put in tubes, and taken the bone out and scraped both ends of it and wired them together.

Q. You did not continue to treat him? He was under the treatment of these other doctors?

A. Yes, sir.

Q. Do you make a specialty of surgery Doctor?

A. No, sir.

Q. You don't do any expert surgery?

A. No, sir.

Q. Doctors Willis, Garrett and Willis make a kind of specialty of surgery, do they not?

A. Yes, sir.

Q. Have you examined his leg recently, Doctor—his right leg?

A. Yes, sir; I have looked at it.

Q. What condition do you find it in with reference to stiffness?

[fol. 143] A. Well, it has got about 45, or maybe 40 or 45 reflection.

Q. About the ankle?

A. It has got permanent extension there—foot and toe.

Q. By "permanent extension," you mean——

A. Fixed in position.

Q. Fixed in the position?

A. Yes, sir.

Q. Has he got the power to raise his foot or his toes—his right foot or toes, up by will, just like you and I can raise ours?

A. No, sir.

Q. That is destroyed?

A. Yes, sir.

Q. Is that permanent?

A. Yes, sir; absolutely.

Q. This stiffness in the knee, is that permanent or temporary?

A. It is permanent.

Q. The shortening of his limb; do you recall how much shorter it is than the other?

A. I think we measured it; about three and a half inches.

Q. Three and a half inches?

A. Yes, sir.

Q. Is that permanent?

A. Yes, sir.

Q. Doctor, is Mr. Ellzey in a condition in which he can engage in manual labor of any kind that requires the use of his hands and standing on his feet without the aid of crutches, and so on?

A. No, sir.

Q. Is his condition that he is in now temporary or permanent, so far as his ability to engage in manual labor is concerned?

[fol. 144] A. It is permanent.

Q. It is permanent?

A. Yes, sir.

Q. Do you know whether Mr. Ellzey suffered pain; suffered with that leg when it was affected and all of that pus in it?

A. Yes, sir; he did.

Q. Is that the history of this kind of cases, that you have considerable suffering?

A. Yes, sir. You run temperature. I was over there a good many times during this six or eight or ten weeks.

Q. How often were you over there?

A. I won't say just how often I was there. With pus in his leg for some six weeks, he run a temperature from 102 to 104.

Q. Is that a very high temperature?

A. Pretty high, for that condition; yes, sir.

Q. Your judgment was that the temperature was due to that infection?

A. Yes, sir.

Q. Somebody seemed to call it Dengue Fever. That was not your idea about it?

A. No, sir.

Q. Did he run that temperature up to the time that Dr. Willis operated on him?

A. Yes, sir.

Q. After the operation and the taking of the pus out of the leg, etc., did that temperature abate?

A. In about a week, I think maybe he ran a little temperature for a week or eight or ten days. I don't know. I didn't have charge of this at all.

Q. I understand you are just giving your best judgment. Do you recall whether it almost immediately reduced the temperature, the taking of the pus out of the leg?

[fol. 145] A. No, I don't. I didn't see him often enough to know that.

Q. But you do know that he ceased to have temperature within a reasonable time after that condition was relieved?

A. Yes, sir.

Mr. Jones: That is all, Doctor.

Cross-examination.

By Mr. Lewis:

Q. Doctor Ellzey, you are an uncle of the plaintiff in this case?

A. No, sir.

Q. What is your relationship?

A. First cousin.

Q. First cousin?

A. His father and my father are brothers.

Q. I understood you to testify that Mr. Ellzey was brought to the hospital late in the afternoon, and that they called you but you could not come on account of being tied up with a case?

A. Yes, sir.

Q. What time the following morning was it when you first saw him?

A. When I got to the hospital, about 10:30, somewhere around that time; not long before he set the fracture.

Q. And Doctor, had his leg been dressed previous, the evening before?

A. Well, it had some bandage around it; yes, sir; and possibly a wire—kind of a wire splin*g* that we use sometimes in those fractures.

[fol. 146] Q. Then, when you first saw the leg, it had some bandages around it and a wire splint?

A. Something like that.

Q. That was the morning after he was brought in the hospital?

A. Yes, sir.

Q. Doctor, did I understand you to testify that when you first saw that leg, it had dirt, bitter weeds, etc., on the bone; in spite of the fact that you have just testified that it was bandaged up and was in a wire splint?

A. Well, after the bandage was removed.

Q. Where was the man at? What hospital?

A. Schumpert Sanitarium.

Q. Do you know who dressed the leg the evening before?

A. Well, I don't know. I understand—I understood that Dr. Jones, at Leesville, put some temporary dressing on the leg; and Dr. Walke, possibly, put this wire splint on and a

little more bandage. Now, where the bitter weeds and grass and stuff was; beneath the shaft to the large bone of the leg, down to the ankle, like that (indicating); this stuff was all under that, and all in this hole where it came out here.

Q. Doctor, you have been the family physician of the plaintiff in this suit all during his life, have you not, since you have been practicing?

A. No, sir. Never lived around him until the last few years.

Q. He has been away from Shreveport, hasn't he?

A. Well, I think he has; yes, sir.

Q. Are you the family physician of his mother or father?

A. No, sir; I am not.

Q. Didn't they insist that you come and see him the night that he was brought in?

[fol. 147] A. They wanted me there; yes, sir; but I just told you that I had an O. D. case that I could not leave, and was already tied up with it; and I advised them to just go ahead; that I couldn't do anything anyway; I was sure it would be left up to the railroad company to care for him.

Q. What did they tell you when you told them that you could not come?

A. They didn't tell me anything.

Q. Did they say anything with reference to their willingness for other doctors to handle the case?

A. They didn't say anything about it; though, if they had set the leg that night, I would not have been present when the leg was set.

Q. Do you know Doctor Frank Walke?

A. I know him.

Q. Do you know him personally?

A. Well, I have met him a few times.

Mr. Lewis: That is all.

Mr. Jones: That is all, Doctor.

The Court: I would like to ask him a question or two.

Q. Doctor, this accident happened at approximately one o'clock in the day. If the patient reached the Sanitarium—I believe the testimony indicates—about eight o'clock at

night, what would be the condition with reference to swelling, etc., of the limb?

A. Well, it would naturally be swollen, sir.

Q. Could you do anything with it without putting the patient under an anæsthetic?

A. No, sir.

[fol. 148] The Court: All right.

By Mr. Jones:

Q. Could you do anything more than clean the outer surface?

A. That should have been done when it first occurred, or as soon as possible.

Q. As soon as practicable?

A. Yes, sir.

Mr. Jones: I believe that is all.

(Witness excused.)

Mr. Jones: We next offer in evidence the American Table of Mortality, approximating the life expectancy of persons of the ages 24 and 26, based on the age of Mr. Ellzey at the time he was injured, of 24 years, and the present time, 26 years. And may I introduce this table without formally proving it up?

Mr. Lewis: Yes, assuming that to be a correct table, I have no objection.

Mr. Jones: Of course, if it should be ascertained that there is anything wrong with this table——

The Court: All right. Counsel can examine it.

[fol. 149] Mr. Jones: The life expectancy of a man at the age of 24 years is 39.49 years; and a man at the age of 26 years is 38.12 years, as shown by the life expectancy table of the American Mortality Table.

Mr. Jones: Now, there is some portions of the defendant's answer that we want to introduce in evidence. Of course, the pleadings, as we understand the rule to be, is that the pleadings of the opposite part are always available as evidence for the opposing party. In other words, the pleadings are not evidence in behalf of a person who files them, but they may be used in evidence against the person who files them.

The Court: I think, under the Pleading Act, that the admissions or denials are before the Court and before the jury. I think the papers are before the Court, but you may offer any part that you like.

Mr. Jones: They have not been read to the jury, but they are available for reading at any time. We would probably save time by deferring that and picking out the portion that we want to offer at the time Court convenes next.

Now, if Your Honor please, the next testimony that the plaintiff will introduce will be the testimony of Doctors Willis and Garrett and Willis. I am sorry to say that that is not available this afternoon. These gentlemen, I don't think we can get them here this afternoon.

The Court: Any objection to taking it when they come, Mr. Lewis?

[fol. 150] Mr. Lewis: No, sir.

The Court: Before we conclude the case?

Mr. Lewis: No, sir.

(Court thereupon adjourned until 9:30 o'clock tomorrow morning, the jury being instructed by the Court not to discuss the case.)

Shreveport, La., October 28, 1924.

Court having reconvened and the plaintiff and his counsel, and the counsel for the defendant being present, and the jury being present and in the jury box, the trial of the case was resumed, and the following proceedings had:

C. E. Ellzey, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Jones:

Q. Give us your initials, Mr. Ellzey?
A. C. E.
Q. You are a brother of the plaintiff, R. E. Ellzey?
A. Half brother; yes, sir.
Q. Half brother?
A. Yes, sir.
Q. Where do you live?

A. Comanche, Oklahoma, at present.

Q. What business are you engaged in?

[fol. 151] A. Drilling contractor.

Q. How long have you been engaged in that business?

A. About fourteen years.

Q. Did Mr. C. E. Ellzey ever work for you?

A. Earl Ellzey, you mean?

Q. I mean Mr. R. E. Ellzey.

A. Yes, sir.

Q. Had he worked in the oil fields before he worked for you?

A. Yes, sir.

Q. Where did he work for you?

A. He worked for me in Burke Burnette and then at Comanche, Oklahoma, and Old Mexico.

Q. What kind of work did he do for you?

A. He worked derricks for me in Burke Burnette for about seven months, and then he worked derricks in Oklahoma about six months.

Q. Is that what they commonly call "rough-necking"?

A. Yes, sir.

Q. And then what other kind of work?

A. Later, he came to Mexico, then, in October, 1920, and dressed tools for me and my brother, I suppose, about six months, he was dressing tools; and the rest of the time he was acting as field superintendent.

Q. Was he a competent tool dresser?

A. I think so; yes, sir.

Q. You used him as such?

A. Yes, sir.

Q. Now then, when he worked for you as tool dresser, what wages did he earn?

Mr. Lewis: If Your Honor please, we want to object to any evidence showing earning capacity of Mr. Ellzey to be in excess of the $150.00 per month alleged in the petition.

[fol. 152] The Court: What is your allegation on that, Mr. Jones?

Mr. Jones: Of course, if it were admitted that he earned $150.00 a month and was capable of earning that, it would be all right. It is asserted, though, that he was not capable of earning $150.00 a month, and we offer as a circumstance, to show that he was——

The Court: You don't propose to show a greater earning capacity than $150.00?

Mr. Jones: Well, not as a basis of recovery. We allege $150.00 per month, and the compensation referred to is based on that; but the fact that he did earn more than that, if he did, is a circumstance merely to show that he would have continued to earn $150.00 a month in the future.

The Court: In any event, he cannot recover in excess of what he alleged. You don't amend your pleadings by the proof in the Federal Court, as you do in the State Court, Mr. Lewis.

Mr. Jones: We allege lump damages of $60,000.00.

The Court: Well, your proof could not enlarge your pleadings in regard to what his earning capacity was.

[fol. 153] Mr. Jones: No, but we could establish what we have alleged by proving a greater earning capacity, and they could dispute it by proving a lesser earning capacity.

The Court: No, unless you have alleged it. This other testimony is admitted subject to the objection. Of course, that means, so far as my view goes, you cannot go beyond what you allege.

Mr. Jones: So far as earning capacity, no; but merely as a circumstance to show that he had the expectancy of continuing to earn that sum of money.

The Court: All right.

Mr. Jones: Will your Honor make the ruling general?

The Court: Same objection and ruling made general, to apply to all testimony of similar nature, and exceptions reserved by plaintiff.

A. Well, part of the time, I paid him $400.00 a month, and the rest of the time I paid him $500.00 a month. I believe there would be probably four months——

Mr. J. D. Wilkinson: That is his opinion.

The Court: State the facts.

[fol. 154] A. Part of the time he was paid $400.00, and the rest of the time, $500.00.

By Mr. Jones:

Q. State whether that was the usual and customary wage for that class of work?

A. It was. And then, board and expenses was included in that too.

Q. You mean that amount and board and expenses extra?

A. That was $500.00 a month and board and expenses.

Q. Is that a class of work that requires manual labor?

A. Yes, sir.

Q. Is it a class of work that a crippled man such as Elzey is now could do?

A. Well, in dressing tools, he would have to be more able to dress tools than he would be acting as field superintendent, but very often a man is forced to carry a load that he naturally would not be able to do.

Mr. Jones: I believe that is all.

Cross-examination.

By Mr. J. D. Wilkinson:

Q. Where did that occur at?

A. Tampico, Mexico; that is, Tampico was the headquarters.

Q. Part of that was to pay him for the danger that he underwent from the Mexicans?

A. No.

Q. Was that wage paid in American money, or Mexican money?

A. American money.

[fol. 155] Q. They don't pay such wages as that in the United States, do they?

A. Well, just about the same.

Q. Did you pay any such wages as that in the Burke Burnette field or the Oklahoma field?

A. Well, in the Burke Burnette field the tools were all dressed in shops. They were not dressed on the rig like they are in Mexico. We didn't have tool dressers to do rough-necking, and they were not classed as tool dressers.

Q. What did he do to earn this salary? What was his title? Field boss or field manager?

A. Field Superintendent, or foreman.

Q. Now, as field superintendent, is it not a fact that he didn't do any manual labor at all, but saw that others did the labor?

A. Well, if a field superintendent didn't have a helper to go with him—which would cost quite a lot of money—because, very often, when he has got to go after tools he would have to carry the tools quite a piece.

Q. Isn't it a fact that the field superintendent superintends others and sees that they do their work?

A. How is that?

Q. Isn't it a fact that the field superintendent superintends others and sees that they do the work?

A. No doubt about that, to a certain extent; but I never saw a disabled man acting as field superintendent, and I don't believe that an oil company would have a disabled man, and I have never seen a disabled man acting as field superintendent.

Q. Well, he had a leg broken, I believe?

A. Yes, sir.

Q. What is the reason why, with a broken leg or with one leg, he could not act as field superintendent?

[fol. 156] A. Because, he could not carry heavy material like he would have to carry from warehouses to different rigs.

Q. Isn't it a fact that he had a day laborer with him to carry them?

A. No, sir.

Q. Isn't it a fact that he does not do manual labor, but makes others do it?

A. Well, I just said that at times he would have to do manual labor.

Q. What would he have to do?

A. Carry tools from warehouses to the car and from the car to the rig and from the car to pumping stations.

Q. He has, then, not only to superintend the work of the others in the field, but also to carry tools and machinery for them to work with?

A. That is the idea; yes, sir; he not only supervises the work, but he has to deliver tools and whatever different pices of machinery to whatever place in the field they are needed, from the warehouses.

Q. What kind of tools does he have to deliver?

A. Well, different tools that go with drilling wells

Q. What is the weight of those tools?

A. Well, they range all the way from five pound monkey wrenches, stilson wrench, to 150 pound fish bill bits.

Q. You don't expect a man to carry 150 pounds?

A. I have myself carried that much; and I suppose he has also.

Q. What was the weight of the equipment that he had to carry? You said that he had to carry tools and some equipment or something?

A. Well, in case of a fishing job, very often they have to carry maybe a heavy load of fishing tools of different kinds; [fol. 157] where there is no fishing job, a load of fish tail bits, rotary bit, etc.

Q. Isn't it a fact that they are loaded in his truck or wagon or whatever he has to carry them, by the warehousemen or people who keep them; and isn't it a fact that they are unloaded by the workmen at the well?

A. No, sir. Often, it may occur that way, but often it would not occur that way.

Q. Isn't that the usual way; that the warehousemen or people at the warehouse load the truck for him; and isn't it a fact that it is customary for the men at the well to unload them?

A. Well now, if he come to a place like Shreveport and got a load of groceries——

Q. I am not asking you about what you would do in Shreveport. I am asking you if it is not the custom in the fields for the people at the warehouse to load the truck?

A. No, because each individual would have a warehouse of their own, and they couldn't afford to have a man stay in there and pay him $300.00. The superintendent carried the things and unloaded the stuff.

Q. Didn't he always have a helper with him?

A. No, sir.

Q. It is not customary for him to have any one to help him load the truck?

A. No, sir.

Q. Supposed to do it himself?

A. Yes, sir.

Q. And no one to help him unload when he gets to the well?

A. Well, no, sir. Maybe some time he would have and maybe many times he would not have.

Q. What wages did you pay in Oklahoma for field superintendent?

[fol. 158] A. I am not operating in Oklahoma at all.

Q. Where did you operate at?

A. In Old Mexico.

Q. You are operating in Old Mexico still?

A. Yes, sir.

Q. And never operated in the United States?

A. Yes, sir.

Q. What wages did you pay in the United States?

A. Well, I never hired a field superintendent in the United States. I always did my own superintending work.

Q. Who are you drilling wells for in Tampico, Mexico?

A. Drilling independent wells.

Q. On leases owned by yourself?

A. Yes, sir.

Q. How many have you drilled?

A. When?

Q. In Mexico.

A. I could not say.

Q. How many producers have you got?

A. Third interest in three.

Q. How many acres of leases have you got?

A. I could not say that. I could not say how many.

Q. About how many acres of leases have you got?

A. Well, I guess it would run around five or six hundred hectares. A hectare is 2 1/5 acres.

Q. You are a half brother of Ellzey?

A. Yes, sir.

Q. You came all the way from Mexico to testify in his behalf?

A. No, sir.

Q. Why did you come here?

A. My father is sick, and I have been here for about three weeks.

[fol. 159] Q. You came to see your father?

A. Yes, sir.

Q. But you made it convenient to come to see him while this case was on trial?

A. No, sir; he has been in the hosiptal about four weeks, and operated on twice in the last four weeks.

Mr. Wilkinson: That is all.

(Witness excused.)

Mr. Jones: That is all except the doctors and those letters that we were talking about yesterday. Plaintiff rests with right to put on the three doctors, Willis, Garret and Willis, and to file the letters inquired about yesteday.

As an explanation of the letter introduced yesterday, we introduce or offer in evidence the original letter dated June 8, 1923, written by Mr. Slentz to Mr. Elzey or attorney or Mr. Ellzey; and then, in the same connection, we offer original letter from the Commissioner, dated August 2, 1923, and the original letter from the Commissioner, written December 10, 1923. And in the same connection, we offer in evidence the original letter written by Mr. Slentz to S. P. Jones, Attorney for Ellzey, and dated February 14, 1924; the original letter written by the Chairman, acting Chairman, of the Commission to Mr. Ellzey, on the same date, February 14, 1924.

Mr. Lewis: Your Honor please, we make the objection that these letters are incompetent and inadmissible to prove the amount of damages; as I understood Your Honor to rule [fol. 160] yesterday that they were admissible in rebuttal of the evidence which we offered about the fifty per cent disability, and for that purpose only.

The Court: Yes, admitted for the sole purpose of rebutting the proof administered by the defense, or expected to be administered, on the question of admissions as to the extent of the injury upon the part of the plaintiff.

Mr. Jones: Now, I believe it would be better for us just to read to the jury now, these letters, and then proceed with the defendant's defense.

The Court: All right.

Mr. Jones: Gentlemen——

The Court: Mr. Jones, I don't know whether Mr. Lewis expects to make any other effort along that line, and so far as I can see, those letters don't amount to anything. In other words, the ruling was that he might, if he were able to show it, make this kind of proof in order to show an

admission as to the extent of the injury on the part of the plaintiff; but I think the letters have dissipated that idea, and that he is now getting the maximum which the Compensation Act permits; and that, of course, dissipates that, and it can have very little bearing upon the question of the extent of injury—as to the value of the injury. I don't think any of this evidence is worth anything to the case one way or the other.

[fol. 161] Mr. Jones: Your Honor, I almost agree with you; but the evidence is in. Now, I have no objection to the letter which shows that they fixed his liability at fifty per cent, on a fifty per cent basis—fifty per cent permanent injury; but I reserved a general objection to their going into this question; but as I explained, I have no objection to the admission of this evidence——

The Court: The point I am getting at; it consumes time here to read those letters, and they don't amount to anything.

Mr. J. D. Wilkinson: Those letters contain a great deal more than matters pertaining to the fifty per cent injury; and that is inadmissible and it is irrelevant to any issue in the case.

Mr. Jones: I want to be perfectly fair with everybody. The letter of February 14, 1924, addressed to me, by the Attorney for the Board, reciting that this letter is written under the approval of the Board, is with reference to the prosecuting of this suit. The letter of February 14th, to Mr. Ellzey, is to instruct him with reference to that. Now then, the other letters—the letter of June 8, 1923, in addition to fixing the extent of liability—that is, they arbitrarily—or, rather, fixed it after such hearing as they had conducted—in addition to that, there is a part of that letter that we want to introduce, with reference to what was required of him by the Commission, in the way of refunding any payments that had been made.

The Court: Here is the situation, Gentlemen; I am not going to stop to have those letters read to the jury. I am [fol. 162] going to state this to the jury: that while the defendant sought to prove that the plaintiff in this case gentlemen, had admitted in his negotiations with the government and settlement of his compensation, a certain amount of injury—that is, the value of his injuries. That

idea has been abandoned on the part of the defense; and the proof establishes that he is now getting, and that the Government finally admitted that he was entitled to the maximum compensation, and he proved that he did not originally accept the fifty per cent compensation which was provided. For that reason, I consider this evidence irrelevant to go into the record; and when the motion was filed here by the plaintiff to strike that out of the answer I ordered it limited to that question alone. The petition does not allege anything about compensation; and I don't think that matter which you have in regard to what the commission did, Mr. Jones, is admissible under the pleadings, in the prosecution of the suit. My viewpoint is that you are entitled to recover of the defendant—that is, if you first establish liability, you are entitled to recover whatever the jury may find, taking all of the facts into consideration, is the extent of your injury. For that reason, we will go on with something else.

Mr. Jones: Excuse me, Your Honor, I don't want to take up Your Honor's time, yet I do want to understand the situation: In this letter which was referred to and that was read, there was a statement with reference to the amount or present value of that fifty per cent compensation. Your Honor will remember it was $7,377.57. Of course, we have no objection to that, if explained with the other letter that shows—well, it was explained by Mr. Ellzey's testimony that it was based on his——

[fol. 163] The Court: I will let you discuss that or read it, if you want to, to the jury when you go to argue the case. What I am trying to do is to get along with the trial. I don't think it amounts to anything one way or the other.

Mr. Jones: I see, but your practice is that we cannot discuss these things unless they are offered in evidence.

The Court: Well, you have offered them in evidence.

Dr. J. C. WILLIS, SR., being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Jones:

Q. Doctor Willis, give us your name and initials.
A. J. C. Willis.
Q. You are a practicing physician and surgeon?
A. Yes, sir.
Q. Living in Shreveport?
A. Yes, sir.
Q. How long have you lived in Shreveport?
A. Twenty years.
Q. How long have you been engaged in the practice of medicine and surgery?
A. About 35 years.
Q. Do you do a general practice, or is your practice limited to any particular line, Doctor?
A. My work is hosiptal and surgery work.
[fol. 164] Q. Hospital and surgery work?
A. Yes, sir.
Q. Are you a graduate of a medical college?

Mr. Lewis: I will admit that Dr. Willis is an expert, without any question.
Mr. Jones: You admit that he is an expert surgeon?
Mr. Lewis: Yes, sir.

By Mr. Jones:

Q. Doctor, do you know R. E. Ellzey, the plaintiff in this case?
A. Yes, sir.
Q. Did you see him professionally at any time in the summer of 1922?
A. (Witness refers to memoranda.) Yes, sir; I saw him, I think it was about the 25th of October of 1922.
Q. Did you know, before you saw him, that he had received an injury and was in the hospital?
A. Yes, sir; I knew he was a patient in the hospital.
Q. What were the circumstances under which you saw him, Doctor? Were you called in by some one?

A. I was called in consultation with Doctor Walke, to see the patient.

Q. Who else was with you?

A. How is that?

Q. Was there any other Doctor?

A. Yes, sir; my son, Dr. Willis, Jr., and Dr. Garrett.

[fol. 165] Q. You examined the leg on that day?

A. We did.

Q. In what condition did you find Mr. Ellzey at that time, with reference to whether he had temperature or not?

A. Yes, sir; he was running a high temperature.

Q. About how high, Doctor?

A. Well, I don't remember just how high.

Q. But you considered it a high temperature?

A. Yes, sir.

Q. You considered that what kind of fever or temperature, Doctor?

A. I thought it was sympathetic fever.

Q. Fever caused by the wounds?

A. By the wounds; yes, sir.

Q. His condition—his physical injuries?

A. Yes, sir.

Q. Did you make an examination of his leg at that time?

A. We did.

Q. What condition—in what condition did you find his leg?

A. Well, we found what was evidently an old bone fracture.

Q. You found a compound comminuted fracture of the leg. What part of the leg?

A. On the left leg, I believe it is.

Q. Wasn't it the right leg?

A. Certainly, the right leg; below the knee, involving both bones below the knee, about the middle third.

Q. What do you mean by a compound fracture?

A. Compound fracture is where, not only the bone is broken, but there is an injury to make it communicate with the skin on the outside.

[fol. 166] Q. Comminuted?

A. That is where there is more than one fracture of the bone.

Q. Now then, did the analysis show any of the bone that passed through the skin?

A. Yes, sir.

Q. You say that it was infected?

A. Yes, sir.

Q. By that you mean, in our common language, it had pus in it?

A. Yes, sir.

Q. To what extent or what way did that pus infection or condition extend, either with reference to the knee and the foot?

A. Well, it was—the whole of the leg was infected.

Q. From the knee down?

A. Practically from the knee down.

Q. What would you say as to whether it was an extensive infection or a limited infection?

A. Well, it was bound to have been systematic to a great extent, because *the* showed that.

Q. Did you give him any treatment that day?

A. I think we had an ex-ray picture made that day.

Q. In this consultation, did you come to a conclusion as to what should be done?

A. Yes. We ordered another ex-ray. I think there had already been made previously, but we ordered an ex-ray examination, and probably some blood examination; and after this, as a result, we decided that we would open up the wound more thoroughly.

Q. Did you open it?

A. Yes, sir.

Q. Then, did you, in fact, operate on him?

A. We did.

[fol. 167] Q. When did you operate?

A. About the 27th, I think; about two days later, as soon as we could get through with the examination.

Q. What kind of an operation did you perform on his leg, Doctor?

A. Well——

Q. I am assuming that you were present when the operation was performed.

A. Yes, sir. Well, we made an incision down in front of the wound and released the pus around it, and removed some dead bone.

Mr. Jones: Mr. Ellzey, will you come around and let the Doctor show us about the injury?

(R. E. Ellzey, the plaintiff, takes a seat in front of the witness.)

Witness: This bone here (indicating), a large bone, sustained a fracture, and dead bone at both ends of that bone had sloughed off.

Q. That was the large bone of the leg, and about what position with reference to the knee and the ankle?

A. It was about the middle third.

Q. About the middle third?

A. And the small bone was broken at two places; and what we call fistula—broken through and extending out; and that was all mashed.

Q. And the ends, either end of this bone, at the fracture, you say, at that time, was dead?

A. Yes, sir; we took out part of the bone, and left it then three and a half inches shorter than the other.

Q. You had to take out the dead bone?

[fol. 168] A. Yes, sir.

Q. Now then, at that time, did you put in any system of drainage?

A. We put in what is known as the Duct drainage tubes, causing a constant flow of fluids through the wounds.

Q. So as to get rid of the pus as much as possible?

A. Yes, sir.

Q. Do you recall how many of those you put in his leg?

A. I suppose there were three or four of them. I don't remember exactly.

Q. Did you do the operating, Doctor?

A. I believe that I did. I rather think that I did.

Q. Your best impression is that you operated on him?

A. Yes, sir.

Q. At any rate, you know that you were there?

A. At any rate, I was responsible for it; yes, sir.

Q. Did you continue the treatment after that, Doctor?

A. Well, most of the treatment was done by my son and Dr. Garrett, I believe.

Q. After the operation.

A. I saw him every few days.

Q. Now then, Doctor Willis, with reference to this place on his leg here, where the large scar appears, and where you pointed out as the place where the bone originally came through the flesh; what is the condition of that skin and tissue at that place?

A. Well, that is scar tissue; and the skin is attached to the bone. You know, ordinarily, the skin is not attached to the bone; but it moves or rotates; but by being attached to the bone like this is, and the scar tissue, the circulation is interfered with there.

[fol. 169] Q. What would be the effect of an injury or an operation on that part of the leg?

A. It would be very difficult to heal.

Q. Do you recall whether that bone is placed together at right angles; that is, straight here where it is put together?

A. It is not entirely straight. There is some angulation.

Q. You can see that by looking at the leg?

A. Yes, sir.

Q. It is just the best that could be had under the circumstances?

A. Yes, sir.

Q. The bone at that place finally re-united, I suppose?

A. Yes, sir.

Q. Do you have any recollection or knowledge of when it finally re-united, Doctor, so as to become a firm union for that place?

A. Let's see. I will have to refer to the record. (Witness refers to memoranda). Discharged the 8th of March, 1923.

Q. How is that?

A. Eighth day of March of the next year, 1923.

Q. Now, Doctor, he has been wearing a brace, it appears. What is the occasion for wearing the brace?

A. Well, it is the deficiency of the leg.

Q. It acts as a support?

A. Yes, sir.

Q. Was there any part of the small bone of the leg taken out to compensate for the part that you had taken out of the larger bone?

A. Yes, sir; small part of the fibula.

Q. So as to make—to permit the shortening of the leg? [fol. 170] A. Yes, sir.

Q. Now, what is the condition, at this time, of his knee, or rather, the knee action?

A. Well, that is the way the knee should fit (illustrating); by raising and lowering the leg, it should come up at an angle; should be a very accute angle by raising it up; but as it is, I notice there, that it is, I suppose, about half what it should be.

Q. About half of his bending powers. I believe you call that "flexion"?

A. Yes, sir. He can extend his knee, probably.

Q. He can extend that leg out straight, but that flexion is about fifty per cent? What is the condition of the ankle and foot, Doctor; with reference to usefulness?

A. Well, his foot— let's see; it is in permanent extension. He has the power of flexion with a permanency of extension.

Q. In other words, a shifting over of the foot?

A. Yes, sir. That is due to the injury to the nerves and the muscles.

Q. Now then, has he any power of bringing his toes up towards his knee, like you or I can?

A. No, he cannot flex that foot.

Q. Now then, by taking hold of the foot, can it be bent back up as far as if it were a normal foot?

A. Not entirely.

Q. It can be brought back just about in the position, with him standing on the foot—on the well foot?

A. Yes, sir.

Q. Could he go down on that foot and bend it forward, like that (illustrating)?

A. Not very well; no, sir.

Q. On account of the stiffness in there?

A. Yes, sir.

[fol. 171] Q. Then, he could not lift it up at all—the toe—in walking?

A. No, sir; he cannot flex that.

Q. How would he accomplish walking; by throwing the foot in sort of a right heaving position?

A. He has to use the muscles of his upper leg.

Q. To lift the toes clean instead of bracing?

A. Yes, sir.

Q. Is that condition temporary, or permanent?

A. That is a permanent condition.

Q. Is that condition in the knee a temporary, or a permanent, condition?

A. I don't think—I believe that might improve some, but I don't think, very much.

Q. Of course, this scarred tissue there, that is permanent, I assume? It will not regenerate?

A. Probably so. That could clear up some, but it will never entirely clear up.

Q. Did you find Mr. Ellzey suffering any when you first saw him?

A. Apparently so; yes, sir.

Q. Appeared to be suffering?

A. Yes, sir.

Q. State whether or not his character of injury is a condition that would usually cause pain and suffering?

A. Yes, sir; no question about that.

Q. Do you find any shortening in any part of that leg?

A. Yes, sir.

Q. You gave us, I think, the amount of shortening as three and a half inches?

A. Yes, sir.

Q. Is that by actual measurement, doctor?

A. Yes, sir; by actual measurement.

[fol. 172] Mr. Jones: I believe that is all.

Mr. Lewis: No questions.

(Witness excused.)

Dr. B. C. Garrett, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Jones:

Mr. Lewis: I will concede that Dr. Garrett will testify to the same thing that Dr. Willis testified to. That will shorten the examination.

Mr. Jones: That will shorten the examination, except I desire to ask him two or three questions.

Q. Doctor, as he explained to you, it is conceded that your testimony with reference to this injury and the condition, etc. will be substantially the same, or the same, rather, as Dr. Willis, who has just preceded you. Did you treat the wound or dress it after the injury occurred?

A. Yes, sir.

Q. I mean, after the operations?

A. Yes, sir.

Q. I will ask you if you gave it the regulation treatment, after the operation?

A. I did.

[fol. 173] Q. Gave it the best treatment that you knew how?

A. Yes, sir.

Q. And that the results that we find are in spite of that treatment?

A. Yes, sir.

Q. You are a graduated and practicing surgeon and physican?

A. Yes, sir; I am.

Q. You have complied with the laws and the requirements of the State with reference to registering, etc. to practice?

A. Yes, sir.

Mr. Lewis: I will admit that.

Mr. Jones:

Q. Your practice is largely limited to surgery, I believe?

A. It is.

Q. What age man are you?

A. Thirty-six.

Mr. Jones: That is all.

Mr. Lewis: No questions.

(Witness excused.)

Mr. Jones: I will state that Doctor Willis, Jr., is out of the city and cannot be had as a witness.

Plaintiff rests.

[fol. 174] DEFENDANT'S EVIDENCE

C. W. PAGE, being sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lewis:

Q. Mr. Page, you are in charge of the United States Marshal's office here?
A. Yes, sir; I am Chief Deputy.
Q. You are the man who employed Mr. Ellzey as a United States Deputy Marshal?
A. Yes, sir.
Q. Was that employment temporary, or permanent?
A. During the existence of the strike.
Q. Just during that emergency?
A. Yes, sir.

Mr. Lewis: That is all.
Mr. Jones: No questions.

(Witness excused.)

H. E. ADAMS, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lewis:

Q. What is your name?
A. H. E. Adams.
[fol. 175] Q. Where do you live?
A. Tampa, Florida.
Q. What is your present occupation?
A. Telegraph operator.
Q. Telegraph operator?
A. Yes, sir.
Q. By whom are you employed?
A. By the Seaboard.
Q. During the month of August, 1922, where were you employed?

A. Carson, Louisiana.

Q. Is that on the K. C. S. Railway Company's line?

A. Yes, sir; K. C. S.

Q. In what capacity were you employed, Mr. Adams?

A. Station Agent.

Q. As station agent?

A. Yes, sir.

Q. Were you there, employed, when Mr. T. M. Merchant, the lineman, and Mr. R. E. Ellzey, United States Deputy Marshal passed by that station or stopped at that station?

A. Yes, sir.

Q. On or about August 10, 1922?

A. Yes, sir; I was there.

Q. What were they riding?

A. A motor car.

Q. Did they stop at Carson, Louisiana?

A. Yes, sir; they stopped there.

Q. How long did they stop there?

A. Well, they stopped about 10:45 in the morning and left there about 12:30 or 12:20, or something like that.

Q. What was the occasion for them stopping, or do you know?

[fol. 176] A. They had some wire trouble, and then they had some car trouble. They stopped there and looked at the telegraph wire to find the wire trouble; and after they got that fixed, they went up to the mill house and got something done to their car.

Q. You say they left at about 12:45 or 12:30 or 12:45?

A. Somewheres along about that time.

Q. What time was the north bound K. C. S. train due at Carson, that comes about noon or shortly after that time?

A. If I remember right, it is 1:15 or 1:05. It is one something; just a few minutes after one o'clock.

Q. What is the number of that train?

A. No. 2.

Q. Do you recall whether or not on August 10, 1922, No. 2 was on time?

A. No, sir; I don't. I think, though, it was a little bit late that day, if I remember right.

Q. How far is it, approximately, if you know, from Carson, Louisiana to Leesville?

A. If I remember right, it is about 28 miles; 27 or something like that.

Q. How far is it, if you remember, from Carson, Louisiana, to De Ridder?

A. It is about six miles; five or six miles.

Q. About six miles?

A. Yes, sir.

Q. What size place is Carson, Louisiana?

A. It is a small place; just a saw mill town.

Q. What kind of depot do you have?

A. Small station.

Q. You had a depot platform?

A. Yes, sir; depot platform.

[fol. 177] Q. Did Ellzey and Merchant have a conversation in your presence with reference to the continuance of their journey on the motor car?

A. Yes, sir; they did.

Q. Will you state the substance of that conversation?

A. Well, they said they were going to Leesville ahead of No. 2, and I told Ellzey I didn't think they had time to go to Leesville ahead of No. 2; and he said he would go if the motor car stayed on the track, and he would make it.

Q. Who said that?

A. Ellzey; this fellow Ellzey that was a guard.

Q. What, if anything, did Merchant say?

A. Merchant said that he was about through with his wild riding.

Mr. J. D. Wilkinson:

Q. Through with his wild riding?

A. Yes, sir.

Q. Then what reply did Ellzey make?

A. He said that they would have some more of it if the damned thing stayed on the track.

Q. Speak a little louder.

A. He said he would have some more of it if the damned thing stayed on the track.

By Mr. Lewis:

Q. Who said that?

A. Ellzey.

Q. What did Merchant say with reference to the trip up to that point, if he said anything? Did he say anything about the speed of the car before they got up to Carson?

A. Not that I remember of; no, sir, except that he was about through with his wild riding.

[fol. 178] Q. Was there anything said, in your presence, about stopping or making a stop at Carson or De Ridder instead of proceeding further north to Leesville.

A. Yes, sir.

Q. What was said?

A. Why, Merchant wanted to leave the car at Carson or leave the car at De Ridder, it seems like, and they——

Mr. Jones: We will object to his conclusions, if Your Honor please.

The Court: Just state what was said about it, Mr. Adams? Don't state your conclusion.

By Mr. Lewis:

Q. What did Merchant say, if anything, about leaving the car at Carson or at De Ridder?

A. He said he would prefer to leave it there, because they didn't have time to go further ahead of No. 2.

Q. No. 2, going North, was the train to Shreveport?

A. Yes, sir.

Q. What did Ellzey say in reply to Merchant?

A. He said he was going to Leesville ahead of No. 2 if it stayed on the track.

Q. Did Ellzey say or do anything that would indicate that he was in a hurry?

A. Yes, sir; he wanted to go ahead of No. 2.

Q. What, if anything, did you say to them with reference to proceeding to Leesville ahead of No. 2?

A. I told him that they didn't have time to make it.

[fol. 179] By Mr. Wilkinson:

Q. And that was when Ellzey said that he would make it if the damned thing would stay on the track?

A. Yes, sir.

Q. When they left there, did they leave at any speed?

A. I don't know, Mr. Wilkinson. I didn't notice when they left. I didn't notice about that.

Q. This conversation that occurred between Ellzey and you and Merchant, who else was there?

A. No one at all.

Q. It occured at the station at Carson?

A. In my office; yes, sir.

Q. And they could have boarded the train at Carson, could they not?

A. Yes, sir.

Q. Could they have left the hand car there?

A. Yes, sir.

Q. They could have boarded the train at De Ridder?

A. Yes, sir.

Q. And could have left the hand car there?

A. Yes, sir.

Q. You were agent down there for quite a while, for the K. C. S. I will ask you whether it is customary to carry passengers upon a hand car?

A. No, sir.

Mr. Jones: If the Court please, I don't see how that is material.

The Court: The evidence up to date, Mr. Wilkinson, shows this man was a guard, and that is why he was riding the car.

[fol. 180] Mr. Wilkinson: Yes, I know that.

The Court: All right.

By Mr. Wilkinson:

Q. Who gave the directions for the repair of the car, do you know?

A. No, sir; I don't. They went to some mill for the repairs.

Q. They went there together?

A. Yes, sir.

Mr. Wilkinson: That is all.

Cross-examination.

By Mr. Jones:

Q. You gathered from the conversation between them that they expected to return to Shreveport on the passenger train?

A. Yes, sir; that is my understanding.

Q. The passenger train would pass through Leesville?

A. Yes, sir.

Q. And no good could be accomplished, that you could see, by Ellzey by catching the train at Leesville?

A. No, sir. I knew nothing about it.

Q. If he caught it at Carson he would get to Shreveport on the same train?

A. Yes, sir.

Q. He could not get to Shreveport any quicker by going to Leesville on the motor car than if he stayed at Carson and caught the train, could be?

[fol. 181] A. No, sir.

Q. You knew that Ellzey was guarding Merchant?

A. Yes, sir; that was my understanding.

Q. You knew that Merchant was going over the line for the purpose of locating trouble in the telegraph line, and making repairs?

A. Yes, sir.

Q. Had you ever seen Merchant before that time?

A. No, sir; never had.

Q. Had you seen other linemen?

A. Yes, sir.

Q. Previous to that?

A. Yes, sir.

Q. He had taken the place of some other lineman?

A. Yes, sir.

Q. Now, had you seen other linemen go over the railroad making repairs on the line, before that?

A. Yes, sir.

Q. How had they traveled?

A. On motor car.

Q. So that was the usual and customary way?

A. Yes, sir.

Q. They traveled over such stretches of the track as they saw fit, on the motor car?

A. Yes, sir.

Q. They got information from you as to the location of trains?

A. Yes, sir.

Q. You had all that information by reason of the fact that you were telegraph operator?

A. Yes, sir.

Q. All train orders passed through your station?

A. Yes, sir.

[fol. 182] Q. That is, you could hear them as they went over the wires, and you knew where all of the trains were?

A. Generally; yes, sir.

Q. Now then, you knew that the passenger train, in fact, lacked some 25 minutes being due when they left your place?

A. No, sir.

Q. You knew its schedule time was something like 25 minutes after they left?

A. Yes, sir.

Q. You knew it was not running ahead of schedule time?

A. Yes, sir.

Q. They don't run passenger trains ahead of schedule time, do they?

A. No, sir.

Q. Then they had a distance of 28 miles to travel to get to Leesville?

A. Yes, sir.

Q. Now then, what was the speed—what was the time, rather, of the passenger train from Carson to Leesville, 28 miles?

A. Well, I don't know about that; but I think it figured something like two and a half minutes to a mile.

Q. It would be something like an hour, or probably a little more—little more than an hour?

A. Yes, sir.

Q. That would give them approximately an hour and twenty five minutes to make 28 miles?

A. Yes, sir.

Q. That would be a speed of something like 20 miles an hour?

A. Yes, sir.

[fol. 183] Q. Well now, do you mean to say that 20 miles an hour is too fast to run the motor car?

A. Well, I don't know about motor cars. I never rode one.

Q. You don't know, then, do you?

A. No, sir.

Q. As a matter of fact, the train was late?

A. Yes, sir; the train was late, a few minutes; that is my understanding.

Q. When did you next see Merchant, after the wreck?
A. Oh, it was some five or six months, I believe.
Q. What was he doing then?
A. Lineman.
Q. Lineman where?
A. For the K. C. S.
Q. Well, working for the K. C. S.?
A. Yes, sir.
Q. Is he still working for them?
A. I don't know if he is now or not.
Q. When did you leave the K. C. S.?
A. April 1st.
Q. April 1st of what year?
A. This year.
Q. What was Merchant doing when you left the K. C. S.?
A. Lineman.
Q. Still lineman?
A. Yes, sir.
Q. Had he been promoted?
A. Not that I know of; no, sir.
Q. But he was still in the same employ?
A. Yes, sir.
Q. Where was your station with reference to Singer?
A. About eight miles north.
Q. Singer was beyond you?
[fol. 184] A. Yes; south of me.
Q. South of you?
A. Yes, sir.
Q. You say you are now at what place?
A. Tampa, Florida.
Q. Are you working there now?
A. Yes, sir.
Q. When did you leave Tampa?
A. Twenty-third of this month.
Q. And came to Shreveport direct?
A. Yes, sir.

Mr. Jones: That is all.

Redirect examination.

By Mr. Wilkinson:

Q. He asked you if they would not have gotten to Shreveport as quick by taking train No. 2 at Carson, as they would by taking it at Leesville; and you answered "Yes." I want to ask you if there was not a good deal of excitement down in that neighborhood, occasioned by strikers, or "fox hunters," as they were called?

A. Yes, sir.

Q. And if Carson was not about in the middle of a hot bed of strikers down there?

A. Yes, sir.

Q. Did you understand that they expected to get to Shreveport quicker by taking the train at Leesville, than they did by catching it at Carson?

A. No, sir.

Q. What was the reason they wanted to get away from Carson and in that neighborhood?

A. I think they were scared and wanted to get away from Carson.

[fol. 185] Q. A number of fox hunters, so called; or coon hunters, had been parading up and down the tracks of the K. C. S., had they not?

A. Yes, sir.

Q. And they had done made the repairs that they had gone there to make?

A. That was my understanding, that they had.

Q. You understood that from them?

A. Yes, sir.

Q. What station did they pass after they completed their repairs?

A. It was my understanding that they had completed their repairs when they left Carson.

Q. I mean the repairs to the line.

A. Yes, sir; that was my understanding; that that was the last work.

Q. That was the last work?

A. Yes, sir.

Q. They had no work to do between there and Leesville?

A. Not that I know of; no, sir.

Q. And their idea in getting away from Carson was, not to get to Shreveport quicker, but to get out of the hot-bed of the strikers? Was that not the fact?

A. Yes, sir.

Q. And had they reported seeing any one along the line, when they got up there?

A. Yes, sir; they did.

Q. What did they say about seeing strikers along the line?

A. That they saw twelve men on horses.

Q. Twelve men on horses?

A. Twelve men on horses.

Q. What did they say about "stepping on the gas" when they saw those twelve men?

[fol. 186] A. If I remember right, they did say something about that.

Q. They said that he stepped on the gas when they saw those twelve men?

A. Yes, sir.

Mr. Jones: Don't lead the witness Mr. Wilkinson.

The Court: Don't lead the witness.

Mr. Wilkinson: All right.

Q. How far from Carson was it that they saw these twelve men?

A. It seems to have been in the neighborhood of Singer some place.

Q. In the neighborhood of Singer?

A. Yes, sir.

Q. And these men were on horses?

A. Yes, sir.

Q. And so at Carsons—was there any strikers around Carson? Any strikers already at Carson?

A. Nothing there; no, sir.

Q. There was no strikers at Carson?

A. There was some few employed at the lumber mill, machinists, I think.

Q. Was Carson itself an especially healthy place?

A. Well, they figured so.

Q. And they wanted to get to Leesville. Is that correct?

A. Yes, sir; that is correct.

[fol. 187] Mr. Wilkinson: That is all.

Recross-examination.

By Mr. Jones :

Q. You had never heard of any strikers offering to show any violence to the United States Marshals?

A. No, sir.

Q. Never did hear of that?

A. I have read of such during the strike.

Q. I am talking about what you read down there.

A. No, sir.

Q. The United States Deputy Marshals; they didn't bother them?

A. No, sir; not that I know of.

Q. There had been a lineman beaten up down there?

A. Down about De Quincy; yes, sir.

Q. And Merchant took his place, didn't he?

A. I don't know if he took his place, or some one else.

Q. Well he took a place on that same line?

A. Yes, sir.

Q. Now, the men that they passed, you had received information before they left there that those men had been arrested, had you not?

A. No, sir; I didn't receive any information.

Q. You did not receive any information about that?

A. Not that they had been arrested.

Q. Or apprehended?

A. I received a notice from the Agent at Singer, for them to come back to De Quincy to identify the men, or try to help find them or something to that effect. I don't know exactly what it was.

Q. To try to identify them?

[fol. 188] A. Yes, sir.

Q. Those men were supposed to be operating out of De Quincy, something like 25 miles beyond you, were they?

A. You mean the men on the horses?

Q. Yes.

A. No, sir; it was in the neighborhood of Singer.

Mr. Jones: That is all.

(Witness excused.)

T. M. MERCHANT, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lewis:

Q. Mr. Merchant, were you employed as a telegraph lineman on the Kansas City Southern in August, 1922?

A. Yes, sir.

Q. You were the lineman that Mr. R. E. Ellzey, the plaintiff in this suit, was guarding while you were at work, were you not?

A. Yes, sir.

Q. Were you on the motor car on which Mr. R. E. Ellzey was riding on or about August 10, 1922, when it was wrecked and Mr. Ellzey was hurt?

A. Yes, sir.

Q. You had gone down South on the K. C. S. to repair some trouble along the line?

A. Yes, sir.

Q. Had you found the trouble?

[fol. 189] A. Yes, sir.

Q. Where did you find the trouble at?

A. On the Board at Singer.

Q. Did you fix the trouble?

A. Yes, sir.

Q. After you left Singer, you proceeded North. Is that right?

A. Yes, sir.

Q. Was there any other trouble along the line—that is, with the telegraph wires?

A. No, sir.

Q. Was there any further work for you to do on the wires?

A. No, sir.

Q. After you left Singer, which way did you proceed—which direction?

A. North.

Q. What is the next town you came to?

A. Carson.

Q. You came to Carson?

A. Bonami.

Q. Is that a large, or a small, station?

A. Small station.

Q. After you left there, what is the next town that you came to?

A. De Ridder.

Q. Didn't you come to Carson before you got to De Ridder?

A. Bonami?

Q. Carson.

A. Yes, sir.

Q. Where is Carson with respect to De Ridder?

A. De Ridder.

Q. Six miles south of De Ridder?

A. Yes, sir.

[fol. 190] Q. Who was the Agent on or about August 10, 1922, at Carson, Louisiana?

A. Mr. Adams.

Q. Were any repairs to the motor car made at Carson, Louisiana?

A. Yes, sir.

Q. What repairs were made?

A. Had threads cut on the gas line.

Q. Had the threads cut on the gas line?

A. The gas line re-threaded; yes, sir. It broke off up in the gas tank.

Q. Where did you have that done?

A. At the saw mill shop.

Q. Then what did you do, after you left the saw mill? Did you go to the station?

A. Went back to the station and put the gas line back on.

Q. Did any conversation occur at the station, in the presence of Mr. Adams, the Agent?

A. Yes, sir.

Q. Between you and Mr. Ellzey?

A. Yes, sir.

Q. You say a conversation did occur?

A. Yes, sir.

Q. State what Mr. Ellzey said with reference to the trip.

A. Well, the special officer at De Quincy wanted him to come back to De Quincy for some purpose; and he said that

he would go on North; that he didn't think it was necessary to go back to De Quincy; he wanted to go home—wanted to get into Shreveport, and he was going.

Q. Who said that?

A. Ellzey.

Q. Before you got to Carson, had you been running the car fast?

[fol. 191] A. Yes, sir.

Q. Did you make any statement to Mr. Ellzey about the speed of the car before you got to Carson?

A. No, sir.

Q. What, if anything, did Mr. Ellzey say about the speed of the car from Carson on your trip North?

A. Well, "Let her go. I have got to get to Leesville ahead of No. 2."

Q. Can you recall exactly what Ellzey said about the speed or about the trip on to Leesville?

A. No, sir.

Q. Did he use—do you recall whether he used any curse words in referring to the car?

A. That was at the depot at Carson.

Q. What did he say at the depot at Carson?

A. I was working on the switch board and I said something to Mr. Adams—I asked him if there was some place to get the motor car fixed at, and he said there was; and then he asked me where we were going, and Ellzey told him we were going to Leesville on the motor car and to Shreveport on No. 2. I says, "I had about enough of that wild riding," and he said, "We will have some more of it if the damned thing stayed on the rail."

Q. Who made that statement?

A. Mr. Ellzey.

Q. Did you tell Mr. Ellzey, in the presence of Mr. Adams there at the station, where you wanted to stop?

A. I told him that I didn't think we could go to Leesville for No. 2.

Q. Where did you want to stop?

Mr. Jones: Let him tell what he said.

[fol. 192] Mr. Lewis:

Q. Did you say anything about where you wanted to leave the motor car?

A. At De Ridder.

Q. At De Ridder?

A. Yes, sir.

Q. How far North is that from Carson?

A. Six miles.

Q. Why did you want to leave the motor car——

The Court: What direction is that from Carson?

Mr. Lewis: North.

The Court: All right.

Mr. Lewis:

Q. Why did you want to leave the motor car at De Ridder?

Mr. Jones: I don't think what he had in his mind would be very important.

The Court: Well, it shows the condition that made it advisable to leave the car there. He may state that.

By Mr. Lewis:

Q. State what reason you had for wanting to leave the car at De Ridder?

A. Well, I wanted a place to leave it so the train could get it. I didn't want to watch until day light on the car and then take it back to De Quincy.

[fol. 193] Q. What sort of a place is De Ridder?

A. I could not say what size, but it is a good big place.

Q. Have you been there?

A. Yes, sir.

Q. Are there hotel accommodations there?

A. Yes, sir.

By Mr. Wilkinson:

Q. Did you say anything to Ellzey about wanting to stop in De Ridder?

A. Yes, sir.

Q. What did he say?

A. Said we were going into Leesville where we started.

Q. Where did he tell you that?

A. At the depot at Carsons.

Q. Why didn't you stop at Carson? Why didn't you leave the car there?

A. There was no conveniences there and no crew for a night train to pick it up.

Q. There were all conveniences at De Ridder?

A. Yes, sir.

Q. Did you tell Ellzey that you wanted to leave the car at De Ridder?

A. Yes, sir.

Q. And he said what?

A. To go on to Leesville.

Q. Why did he want to go on to Leesville?

A. I don't know.

Q. So then you went on to Leesville at the instance of Mr. Ellzey himself?

A. Yes, sir.

Q. If you had been by yourself, you would have stopped at De Ridder?

[fol. 194] A. I would have went back to De Quincy.

Q. Where you got the car from?

A. Taken the car back where I borrowed it.

Q. When you reached Carson you had already finished the repairs to the wire?

A. Yes, sir.

Q. And De Ridder was six miles further North?

A. Yes, sir.

Q. And the accident occurred between De Ridder and Leesville?

A. Yes, sir.

By Mr. Lewis:

Q. State what, if anything, Mr. Ellzey said to you about the speed of the car after you left Carson?

A. Well, we had to go through a tunnel at De Ridder, and he says, "We will have to run now"—And he stopped somewhere else at De Ridder and lost about four minutes; and he said, "We sure enough will have to run now."

Q. Did Mr. Ellzey make any criticism or complaint with reference to the ability of the car to make speed?

A. Yes, sir.

Q. State what those criticisms or complaints were?

A. "What is the matter with the damned thing? It won't run any more." When we started down the hill north of Ludington, he wanted to know what was the matter with the damned thing, it would not run. One cylinder fell off down the hill.

The Court:

Q. One cylinder fell off?

A. One cylinder quit working; yes, sir.

The Court: All right.

[fol. 195] By Mr. Wilkinson:

Q. At any time on the trip from De Ridder to Leesville, what, if anything, did Mr. Ellzey say to you, urging you to run the car faster?

Mr. Jones: Directly leading.

By Mr. Wilkinson:

Q. Well, did he say anything?

A. When it fell out at Ludington—when the car fell off——

Q. Where is Lundington?

A. Two miles north of De Ridder.

Q. Two miles north of De Ridder?

A. Yes, sir.

Q. That was between De Ridder and Leesville, then?

A. Yes, sir.

Q. What did he say about it then?

A. He wanted to know what was the matter with the damned thing, it would not run any faster.

Q. Weren't you running fast?

A. Yes, sir.

Q. And he wanted to know why it would not run faster?

A. Yes, sir.

Q. What did you tell him?

A. One cylinder fell off.

Q. One of the cylinders fell off?

A. Yes, sir.

Q. One of the cylinders cut off—that is, would not work?

The Court: He means it quit working. I asked him about that — while ago.

[fol. 196] Mr. Wilkinson: All right, you can take the witness.

Cross-examination.

By Mr. Jones:

Q. How many cylinders did the car have?
A. Three.
Q. Two?
A. Three.
Q. Three cylindered car?
A. Yes, sir.
Q. Ane one of them quit working?
A. Yes, sir.
Q. And of course that retarded the ability of the car to pull?
A. Yes, sir.
Q. Did you fix that?
A. No, sir.
Q. You continued to operate with two cylinders from then on?
A. Yes, sir.
Q. Now, Mr. Merchant, when did you begin to work with the Kansas City Southern Railway Company?
A. In June, 1922.
Q. In June, 1922?
A. Yes, sir; 17th day of June, 1922.
Q. Where did you begin work?
A. Heavener, Oklahoma.
Q. What kind of work?
A. Lineman helper.
Q. What had you been doing before that time?
A. Working on a farm.
Q. What age man are you?
A. Twenty-five.

[fol. 197] Q. Now twenty-five?
A. Yes, sir.
Q. Had you had any experience in line work before you went on the job there at Heavener, Oklahoma?
A. No, sir.

Q. Then you continued to work as a lineman on through July and up into August?

A. Yes, sir.

Q. You were not in the construction work but in the repair work?

A. Yes, sir.

Q. Your duty was to go over the line and find any trouble that might exist, and make repairs?

A. Yes, sir.

Q. You had been doing that since the 17th day of June?

A. Yes, sir.

Q. How did you get over the line?

A. On a motor car.

Q. They furnished you a motor car?

A. Motor car; yes, sir; all the time.

Q. Now then, they left it to you to pick up and leave the motor car at different places?

A. Yes, sir.

Q. There was no definite instruction to you or rule about where you left that motor car?

A. Yes, sir; supposed to carry the motor car back to where I picked it up.

Q. If it was convenient to do it?

A. Yes, sir.

Q. But yet you could leave it at some other place?

A. We had to take it back later, if we didn't take it then.

Q. You had to ultimately take it back?

[fol. 198] A. Yes, sir.

Q. They didn't require you to go out and find trouble on the line and repair it and then leave the motor car there at the place where you made the repair to the line?

A. Well, I have done that.

Q. You could do it if you wanted to?

A. Yes, sir.

Q. That was up to you?

A. Yes, sir.

Q. Now, you had the right to go on into Leesville?

A. Well, yes, sir.

Q. You had that right?

A. Yes, sir.

Q. You would not have done that if you had not?

A. Well, yes; if he insisted on getting to Leesville.

Q. You might have done that even if you had not had the right to?

A. Yes, sir.

Q. But you had the right to go there?

A. Yes, sir.

Q. Now, on the 9th of August—or on the 8th of August rather, you were with the wrecking crew at a place where they took up a wreck, near Leesville?

A. Yes, sir.

Q. And on the 9th of August, you were still with the wrecking crew over near Rosepine?

A. Yes, sir.

Q. They picked up an engine there and started back to Shreveport?

A. Yes, sir.

Q. And that crew, of which you were a member, got back—finally got back to Leesville. Is that correct?

A. Yes, sir.

Q. Now then, you were the only lineman in that crew, I suppose?

[fol. 199] A. No, sir.

Q. Was there another one?

A. Yes, sir.

Q. Two linemen?

A. Electrician—that had been a lineman, but at that time he was an electrician.

Q. And Mr. Ellzey was United States Deputy Marshal?

A. Yes, sir.

Q. You knew that?

A. Yes, sir.

Q. He was there to guard the outfit while you were taking up those wrecks?

A. Yes, sir.

Q. As you went into Leesville, or about the time you got to Leesville on the afternoon of the 9th, Mr. J. E. Murphy told you that tnere was trouble in the telegraph line down towards De Quincy?

A. Yes, sir.

Q. Between De Ridder and De Quincy, to be exact?

A. Between Carson and Singer.

Q. Between Carson and Singer?

A. Yes, sir.

Q. He told you to get off at Leesville and go back down that day, and if you could find it to stop and repair it?

A. Yes, sir.

Q. He told you that he would send Ellzey along to guard you, didn't he?

A. Yes, sir.

Q. Now, you knew that there had been some one—some lineman had been beat up down in that country, didn't you?

A. Yes, sir.

Q. You wanted a guard, of course?

[fol. 200] A. No, sir; it didn't make any difference to me about a guard.

Q. Oh, you told him you didn't need a guard?

A. I told him I rather not go with a guard, because I knew where I stood.

Q. You told him you didn't want a guard?

A. I told him it didn't make any difference whether I had one or not.

Q. Any way, he sent a guard with you?

A. Yes, sir.

Q. All right, you didn't find the trouble as you went down?

A. No, sir.

Q. Who was this Mr. J. E. Murphey?

A. Superintendent of the Southern Division.

Q. Superintendent?

A. Yes, sir.

Q. He instructed you to repair that trouble before you came back to Shreveport, didn't he?

A. Yes, sir.

Q. He instructed you to come back to Shreveport after you made your repairs, didn't he?

A. No, sir.

Q. Didn't he instruct you—What did he instruct you to do after you finished that work?

A. He didn't leave any instructions.

Q. What were you going to do?

A. Lay around down there until something else showed up.

Q. Didn't you know that Ellzey had a pass to come back on the Passenger train to Shreveport?

A. Yes, sir.

Q. But you say that you didn't expect to come back to Shreveport?

A. No, sir; I didn't expect to come back to Shreveport.

[fol. 201] Q. Did you come back to Shreveport?

A. Yes, sir.

Q. Did you come back to Shreveport on the passenger train?

A. Yes, sir.

Q. You had an annual pass, I presume?

A. Yes, sir.

Q. Now then, when you got to De Quincy, you spent the night there?

A. Yes, sir.

Q. Ellzey and you spent the night in the same room?

A. Yes, sir.

Q. Next morning, you got this motor car and went north?

A. Yes, sir.

Q. It was the second motor car that you tried, was it not?

A. Yes, sir.

Q. You got the batteries and put in the car?

A. Yes, sir.

Q. When did you first have trouble with the car on your trip North?

A. When we first started out with it; hard to get started.

Q. Then, after getting away from De Quincy, where did you have your next trouble?

A. North of Fields.

Q. Where is that with reference to Singer?

A. About five miles south of Singer.

Q. What kind of trouble did you have there?

A. Gas line broke.

Q. How did you get from there into Singer?

A. Poured gasoline into the carburator with a bottle.

Q. Then, at Singer, what did you do?

A. Looked over that Board and coupled the switch Board up to the cable post.

[fol. 202] Q. And found it all right?

A. Found it all right, and proceeded on to Carson.

Q. Up to Carson?

A. Yes, sir.

Q. How did you get to Carson?

A. On the motor car.

Q. Well——

A. By pouring gas in the Carburator, same as I did before.

Q. How far is it from De Quincy to this place that you say that you had trouble—where the line broke?

A. Didn't any line break.

Q. I mean, the gas line.

A. Seven miles.

Q. Seven miles out of De Quincy?

A. Yes, sir.

Q. And then you traveled five miles on to Singer?

A. Yes, sir.

Q. Then you traveled how many miles on to Carson?

A. Six miles.

Q. You had seven miles of fairly good running out of De Quincy?

A. Yes, sir.

Q. And then you fed it with a bottle from there into Carson?

A. Yes, sir.

Q. Pretty hard running, wasn't it?

A. Yes, sir.

Q. Slow running?

A. Well, no so very slow.

Q. You had to push some of the time, didn't you?

A. Yes, sir.

Q. To push it up hill and ride down hill?

A. Well, not exactly.

Q. Pushed up some of the hills?

[fol. 203] A. Well. shove it off sometimes when the gas would run low in the carburator.

Q. Then, at Carson, you did find the trouble in the telegraph line?

A. In the switch board at Carson.

Q. And made the repairs there?

A. Yes, sir.

Q. And then you went over to a saw mill and got this gas line fixed?

A. Yes, sir.

Q. What did you want to fix the gas line for?

A. So we would not have to pour gasoline in the carburator.

Q. So you would not have to feed it with a bottle?

A. Yes, sir.

Q. Well, you were going to De Ridder, you say?

A. That was my intentions; yes, sir.

Q. Did you tell Mr. Adams that you were going to De Ridder?

A. Yes, sir.

Q. You had told Mr. Ellzey you were going to De Ridder?

A. I suggested to Mr. Ellzey that we stop at De Ridder, and he said "We will go to Leesville."

Q. Well, it was your idea to go from Carson to De Ridder, was it not; after you got through there at Carson?

A. Yes, sir; my idea was to go to De Ridder——

Q. Well——

Mr. Wilkinson: Let him finish his answer.

Mr. Jones:

Q. Well, that was your idea and your suggestion, was it not?

[fol. 204] A. Yes, sir.

Q. And Ellzey suggested that you go to Leesville?

A. Yes, sir.

Q. Now, when you started out from Leesville, did Mr. Murphy—He told you that Ellzey was to go with you and guard you, didn't he?

A. Yes, sir.

Q. You knew that he was going as your guard?

A. Yes sir.

Q. That he was to protect you?

A. Yes, sir.

Q. Wherever you went? That is correct, isn't it?

The Court: Mr. Merchant, I want you to speak out so this gentlemen that is taking your statement down can get what you say. Now, I have reminded you of that two or three times. Don't let me have to do it any more.

Mr. Jones:

Q. You knew that he was to guard you?
A. Yes, sir.
Q. And was to stay with you as long as you wanted him?
A. Yes, sir.
Q. Or until you got back to Shreveport?
A. Until I got the line repaired.
Q. And to stay with you as long as you wanted him, is not that a fact?
A. Yes, sir.
Q. You left there and went towards Leesville?
A. Yes, sir.
Q. You operated the car?
A. Yes, sir.
Q. You operated the car from De Quincy up to the time that the wreck occurred?
[fol. 205] A. Yes, sir.
Q. Ellzey didn't operate it?
A. No, sir.
Q. Now, the car wrecked at about what time?
A. About 1:30.
Q. About 1:30 in the afternoon?
A. Yes, sir.
Q. When you left Carson, how much were you ahead of the passenger train, had the passenger train been on time?
A. About forty minutes.
Q. Forty minutes ahead of the passenger train?
A. Yes, sir.
Q. When you left De Ridder, how much ahead of the passenger train were you, had it been on time?
A. About 17 minutes.
Q. You had lost some time up to De Ridder?
A. Yes, sir.
Q. When the car wrecked, how long after the wreck before the passenger train arrived?
A. About fifty minutes.
Q. About fifty minutes after that the passenger train arrived at the wreck?
A. Yes, sir.
Q. Now, then, what did you do next day after this wreck?
A. Come up and stayed around the shops here.

Q. Well, were you discharged?
A. No, sir.
Q. You continued in the employ of the defendant?
A. Yes, sir.
Q. How long did you remain in the service of the Kansas City Southern Railway after that?
A. I have been in the service ever since.
[fol. 206] Q. In what capacity?
A. Lineman.
Q. Have you been using motor cars since?
A. Yes, sir.
Q. Have you been advanced or promoted in the service or still in the same position?
A. In the same position.
Q. Wages the same?
A. Same thing.
Q. You say that a special officer at De Quincy wanted you to come back down there to identify the men that you had seen?
A. Wanted Mr. Ellzey to come back down there, yes.
Q. You mean by that that you got a message?
A. No, sir: I didn't get any message.
Q. How did you get that information?
A. The operator told Mr. Ellzey.
Q. That the special agent down there wanted him?
A. Yes, sir.
Q. Do you know who the special agent was?
A. Yes, sir.
Q. Who was it?
A. Mr. Lilley.
Q. Now, you said that if you had been alone that you would have gone back to De Quincy?
A. Yes, sir.
Q. If you had been alone you would not have been there at Carson?
A. Yes, sir.
Q. Do you mean to say that you would have gone down there—I mean to Carson—without a guard?
A. Yes, sir.
Q. What did you let Ellzey go along with you for?
[fol. 207] A. That was instructions from Mr. Murphy, to

go along with Mr. Ellzey, and do as he said and he was sure I would come out all right.

Q. You were sent out to make repairs?
A. Yes, sir.
Q. And the Deputy Marshal was sent along with you?
A. Yes, sir.
Q. To protect you?
A. Yes, sir.
Q. But you didn't want him?

(No answer.)

Q. What did you say to Ellzey when you saw those fox hunters?
A. I didn't say anything.
Q. What did you do?
A. Not anything; kept on riding.
Q. Did you increase the speed of your car?
A. No, sir.
Q. Decrease it?
A. No, sir.
Q. Just kept on riding?
A. Yes, sir.
Q. It didn't scare you?
A. No, sir.
Q. You were not frightened?
A. No, sir.
Q. You didn't leave Carson and go to Leesville because you were frightened?
A. No, sir.

Mr. Jones: That is all.

(Witness excused.)

[fol. 208] G. T. Anderson, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lewis:

Q. What is your name, sir?
A. G. T. Anderson.

Q. Mr. Anderson, in August, 1922, when Mr. Ellzey was hurt on the motor car wreck, were you employed by the Kansas City Southern?

A. Yes, sir.

Q. In what capacity?

A. General Road Master.

Q. Were you on train No. 2 coming to Shreveport on the date Mr. Ellzey was hurt?

A. Yes, sir.

Q. Did you have occasion to examine the motor car after the wreck?

A. Yes, sir.

Q. Did you find anything wrong with the motor car?

A. No, sir.

Q. Found it in good shape?

A. Yes, sir; the car was in good shape.

Q. I mean, of course, it was wrecked?

A. Yes, of course, it was damaged by the wreck.

Q. Did you make an examination of the motor car?

A. Yes, sir.

Q. Did you see anything that would indicate anything was wrong with the motor car before it wrecked?

A. No, sir.

Q. Mr. Anderson, are you familiar with the operation of motor cars?

A. I am.

[fol. 209] Q. What is the effect, with reference to the operation of motor cars, as to their wabbling at high speed?

A. If a car is running at high speed it will wabble.

Q. Is that the same sort of effect that you would get on a passenger or freight car?

A. Yes, sir.

Q. Mr. Anderson, are you familiar with the regulations of the Kansas City Southern Railway Company regarding the use of motor cars in August, 1922?

A. Yes, sir.

Q. What were those regulations with reference to carrying people on motor cars?

Mr. Jones: I see no useful purpose that can serve.

The Court: What is the object?

Mr. Lewis: I want to show by Mr. Anderson, if Your Honor please, that motor cars were prohibited from doing so, except when absolutely necessary and in performing some duty, and employees were prohibited from operating motor cars except when absolutely necessary in the performance of their work.

The Court: Well, I don't know that has very much to do with this present case, because the man, if the case up to date is true, went out as a guard to this employee, with express permission to use the motor car.

Mr. Lewis: I want to show that after the undertaking was ended; after those repairs were completed, that this man was prohibited from riding on that motor car, under the existing rules.

[fol. 210] The Court: All right. Let it go in for whatever it is worth.

To which Counsel for Plaintiff excepted.

By Mr. Lewis:

Q. Mr. Anderson, under the regulations of the Railway Company at the time of this accident, was anybody allowed to use the motor cars except in the performance of their duty?

A. No, sir.

Q. Were the operators of those motor cars permitted to carry passengers?

A. No. Only in the discharge of duty. The instructions were that motor cars would absolutely not be used——

Mr. Jones: Are those instructions in writing?

By Mr. Lewis:

Q. Were those instructions in writing?

A. Yes, sir.

Q. Have you got a copy of those instructions?

A. Well, I have in my office. We don't carry anybody on motor cars if their duty don't require them.

Cross-examination.

By Mr. Jones:

Q. During the strike a great many of your regulations were discarded, weren't they?

A. No, sir.

Q. And didn't you carry men on freight trains and motor-cars as guards and United States Marshals?

[fol. 211] A. Only in the discharge of the duty.

Q. Well, the Marshal didn't owe you any duty at all except to protect your men? He wasn't an employee?

A. No, sir.

Q. Now, you frequently carried deputy marshals on freight trains, didn't you?

A. Well, I don't know.

Q. Didn't you carry them on motor cars?

The Court: State, if you know.

A. Yes, sir.

By Mr. Jones:

Q. They did. And the linemen used motor cars before the strike to go out on the line and make repairs?

A. Yes, sir.

Q. They used them almost exclusively, didn't they?

A. No, sir.

Q. How did they get out?

A. On the trains.

Q. They would not stop a train to make repairs out on the line?

A. They would stop and let them off to make the repairs, but the train would not wait for them.

Q. Didn't the linemen go out on motor cars to make repairs?

A. In some instances; not often.

Q. How did this lineman happen to take your motor car?

A. Well, he got the car without permission. I thought possibly his duty required him to take it.

Q. Any way, he took it?

[fol. 212] A. He was on the car.

Q. And you say that he didn't have the right to take it?

A. Well, no; I would not say that he didn't have the right to take it.

Q. Will you say that he did have the right to take it?

A. I will say that he taken the car.

Q. Well, do you say that he had the right to take it?

A. Ordinarily they don't take those heavy cars without permission.

Q. Do they take the light ones without permission?

A. They have cars furnished to their service; small cars that they can handle.

Q. But he did take your car?

A. Yes, sir; he had it just the same.

Q. Did you make any complaint about his taking your car?

A. No, sir.

Q. Did you make any complaint to your superior about his taking your car without your consent?

A. No, sir.

Q. Why didn't you?

A. Well, they had done taken the car and used it.

Q. Well, you recognized that he had the right to do it didn't you?

A. Well, ordinarily they don't use those cars.

Q. Any way, you don't think that there was anything wrong in this taking your car and using it?

A. Well, we take various methods when we have line trouble.

Q. I would like for you to answer the question. I am willing for you to answer it in your way, but I do want you to answer it. You don't recall any protest against the use of the car?

[fol. 213] A. No.

Q. You didn't make any protest against the use of the car?

A. No, I didn't protest, for the reason that I was not at the point where he got the car. I was away from there.

Q. Well, he took your car out and wrecked it?

A. Yes, sir.

Q. If he didn't have the right to take it, somebody was responsible for that car being out there wrongfully. Now, did you make any complaint about him taking it out?

A. No, sir.

Q. You recognized that he had the right to do it, didn't you?

A. Well, not entirely; no.

Q. Not entirely?

A. No, sir.

Q. You had no control over him—over Mr. Merchant?

A. No, he works under a different department.

Q. He could go where he pleased, couldn't he?

A. Well, we have a right to direct him in case of line trouble, but we don't instruct them very often, because that is handled by the Chief Dispatcher.

Q. A different department?

A. Yes, sir.

Q. I believe you have said that it was customary during that trouble to carry marshals as guards out on the motor cars?

A. I only know of one case, to my knowledge, and that was this case, that a marshal was carried.

Q. He was carried in this case?

A. Yes, sir.

Q. You don't mean to say that Mr. J. E. Murphey did not have a right to send Merchant out to make those repairs?

[fol. 214] A. Oh, no; he had the right, yes, sir.

Q. You don't mean to say that Mr. Murphey did not have the right to permit him to go out on the motor car?

A. Well, he has the right to go out on the motor car if his duty requires it.

Q. And Mr. Murphey had the right to send him out, didn't he?

A. Oh, yes; yes, sir.

Q. He was really the boss of the lower end of the line, was he not?

A. He was in charge of transportation.

Q. On the lower end of the line?

A. Yes, sir.

Q. Well, the telegraph line is used in the transportation department solely, is it not?

A. Well, not solely. Of course, it is used in dispatching and handling trains.

Q. Well, that is the transportation department?

A. Yes, sir.

Q. What portion of the car did you examine?

A. The entire car.

Q. You didn't find anything wrong with it at all?

A. Well, of course, the car was damaged by the wreck.

Q. What damage was done to it?

A. The front wheels.

Q. What was done to them?

A. They were bent.

Q. The wheels, or the axle?

A. The wheels and the axle was bent some too.

Q. You found it, then, when you examined it, with bent axle and bent front wheels?

A. Yes, sir.

Q. Could you tell from that examination when the axle was bent?

[fol. 215] A. Yes, sir.

Q. How could you tell?

A. By the rust on the axle—broken on the axle.

Q. How long had the rust been broken on it?

A. I assume, at the time of the accident.

Q. Could you tell whether it was broken the day before or the day of the accident?

A. Well, you can tell when a piece of iron has been misplaced, by the signs on it.

Q. You can tell as long as the sign is new, that it is a new break or a new injury; but you cannot tell whether it is two hours old or three days old?

A. Well, I don't know that you can run it down to the minute.

Q. You cannot run it down to the day?

A. Well, I don't know.

Q. You are a practical man, Mr. Anderson. Don't you know that you cannot take a piece of iron that is bent and tell whether it was bent today or bent four days ago?

A. You can take a piece of iron, bent, and the atmosphere has a tendency to corrode over in a very short time after it is bent.

Q. It will not do that in three or four days?

A. Oh, yes, sir.

Q. You think that?

A. Yes, sir.

Q. Ordinary dry summer weather such as we had in August, 1922?

A. We had some rain in August, 1922.

Q. Was it raining that day?

A. No, sir; it was not.

Q. Did it rain the day before?

A. Well, I am not positive. I don't recall.

[fol. 216] Q. What part of the wheels was bent, Mr. Anderson?

A. The hub of the wheel, and the wheel being kinder in all the time.

Q. Flange bent?

A. No, sir.

Q. What part of it?

A. The hub was broken loose.

Q. The hub was broken loose?

A. Yes, sir.

Q. Now then, you say that the rear of a motor car will wabble when it is going at high rate of speed?

A. They will wabble all over when they are going at a high rate of speed or excessive rate of speed.

Q. Well, a car will wabble if the bearings or journals are not *sung*, don't fit *sung*, at moderate speed, won't they?

A. Well, a car that is worn or a new one will wabble at a high rate of speed.

Q. And a car that is worn will wabble at a moderate rate of speed?

A. Well, there is not much lateral motion in those cars.

Q. Well, everything wears out with age, doesn't it?

A. Certainly; yes.

Q. Now then, a car that is worn will wabble at a moderate rate of speed?

A. We have standard mechanics to keep these up.

Q. Will a car that is in good condition wabble at a speed of twenty miles an hour?

A. No, sir.

Q. Then, if a car wabbles at a speed of twenty or twenty five miles an hour, you would regard that there was something wrong with it?

[fol. 217] A. Well, ordinarily, a car won't wobble at a speed of twenty or twenty five miles an hour.

Q. That is, if it is in good condition?

A. Yes, sir.

Q. And if it does wabble at that speed, you would regard it as not being in good condition?

A. Well, not exactly.

Q. Well, it would not be ready for the junk pile. It might not show that it was in that condition, but it would show that it was in bad condition?

A. It takes excessive speed for those cars to wabble.

Q. You say it takes excessive speed for cars to wabble that are in good condition. I am talking about those that are not in good condition. If it wabbles at a speed around twenty or twenty-five miles an hour, between twenty and twenty-five miles an hour, you would look for the car to have something wrong with it?

A. Yes, sir.

Mr. Jones: That is all.

Redirect examination.

By Mr. Lewis:

Q. Mr. Anderson, J. E. Murphy is dead now, is he not?

A. Yes, sir.

Q. When did he die, do you know?

A. It was in October or November, 1922, if I recall right.

Q. Mr. Murphy is the man who was in charge of the transportation that you have been talking about.

A. Yes, sir.

Q. Mr. Anderson, had you inspected this particular motor car before the wreck occurred?

[fol. 218] A. Yes, sir.

Q. When did you inspect it?

A. July 3d.

Q. July 3d, preceding the date on which this accident occurred?

A. Yes, sir.

Q. What condition was it in then?

A. In good condition.

Q. Was the motor car used excessively between that day and when the wreck occurred?

A. No, sir; it had not been used, so far as I know.

Mr. Lewis: That is all.

Recross-examination.

By Mr. Jones:

Q. Do you know whether it was used on Section 103 a few days before that?

A. Prior to July 3rd?

Q. No, prior to August 10th?

A. I don't think so; no, sir.

Q. You don't know, however?

A. No, sir.

Q. Where were your headquarters?

A. Texarkana.

Q. You don't know whether they had been using it on Section 103?

A. Well I said it was not used so far as I knew, on Section 103. It is customary to use those motor cars on sections.

Q. I didn't ask you anything about custom. I just want to know whether you know about it being used. That is all.

(Witness excused.)

[fol. 219] Dr. Frank H. Walke, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lewis:

Q. Dr. Walke, what are your initials?

A. Frank H. Walke.

Q. You are a licensed and practicing physician in the City of Shreveport, and actively practicing?

A. Yes, sir.

Q. How long have you been practicing?

A. Twelve years.

Q. Doctor Walke, you were practicing medicine in Shreveport on or about August 10, 1922, when a man by the name of R. E. Ellzey was brought to Shreveport after having been injured in a motor car wreck?

A. Yes, sir.

Q. How soon after Ellzey was brought down there before you saw him?

A. As soon as he arrived at the hospital. I was wired by the Company dispatcher to be at the Sanitarium when he arrived. I was there at the operating room when he arrived.

Q. You were in the operating room when he came up?

A. Yes, sir.

Q. Doctor Walke, what did you do to Mr. Ellzey in the operating room?

A. Well, at first, we looked for his general condition. He was badly shocked and very cold and clam-y, and was suffering some pain; and he had lost blood—and we call that apathetic shock, fast beating pulse. And then, I took the dressing off his leg, some ordinary emergency dressing [fol. 220] that was put on it right over his trousers; and the first thing was to expose the wound, to look at it and learn the extent of the injury.

Q. Did you complete dressing the wound at that time?

A. Well, we cleaned the wound out as best we could but he would not let us touch it until Dr. Ellzey arrived. He would not let us do anything until Dr. Ellzey arrived. And he said that he was their family physician and a kinsman, and he would not let us do any operating or give any anæsthetic or go under an anæsthetic and have it cleaned out properly until Dr. Ellzey was present. I didn't know Dr. Ellzey, and at that time I didn't know where he was living. And so he said that he could not get Dr. Ellzey until the following morning, and this was on the afternoon of August 10th; and we got together and had a consultation next morning, and then Dr. Ellzey assisted in operating and putting the leg in position the following morning; and we cleaned out the old cockleburs and dirt and cinders ground in this wound by the accident. We washed all this out the day before except that that was ground in to where we could not get to it without excruciating pain, and the patient would have to be put under an anæsthetic, and we couldn't do this without Mr. Ellzey, because his father and the patient wanted Dr. Ellzey present when that was done.

Q. Was there any objection made to your proceeding at once to thoroughly clean out that wound?

A. I don't know as there was any objection except that they wanted Dr. Ellzey present when any operative procedure took place. We only put on first aid dressing.

Q. Could you have cleaned out that wound without using a general anæsthetic?

[fol. 221] A. No, sir.

Q. Were they willing for you to give him a general anæsthetic before Dr. Ellzey arrived?

A. No, sir.

Q. If any objections were made, state what they were and who made them?

A. Well, Mr. Ellzey and his father; his father particularly was the one that was very anxious to have Dr. Ellzey present.

Q. Did he say anything, and if so, what, to the effect that he didn't want you to put him under a general anæsthetic until Dr. Ellzey got there?

A. Yes, sir; he said that he wanted to wait until Dr. Ellzey arrived.

Q. Who was that?

A. His father and himself.

Q. You mean the father of the plaintiff in this case?

A. Yes, sir; Mr. Ellzey's father, and himself.

Q. Doctor Walke, I show you one of your bill heads, bill rendered by you against the Kansas City Southern Railway Company for $500.00, "to professional services rendered R. E. Ellzey, August 10, 1922 to March 1, 1923." Is that the bill that you rendered the company in this case for your services?

A. Yes, sir.

Mr. Jones: I don't see the importance or the admissibility of it in any way whatever.

Mr. Lewis: If Your Honor please, the answer alleges a reconventional demand and states that these services were furnished at the request and instance of Mr. Ellzey, and that they were accepted by him, and the law would imply an [fol. 222] obligation on his part to repay the company the reasonable value of those services. I am proving the fact that we have paid these doctor bills and hospital bills and that we are entitled to recover of Mr. Ellzey the amount we have paid out at his instance and request.

Mr. Jones: Well now, you see, here is the status: This man was entitled to Government treatment free, and the Government was ready to take charge of him and give him the treatment, and the railroad intervened and took the responsibility of treating and repairing the man, and the railroad couldn't do that and then charge the man for the repairs.

The Court: I think it all depends upon the facts, gentlemen. If the plaintiff in this case requested the services of this railroad's facilities for treating his wounds, why there would be, perhaps, a liability to repay it. If he did not, why there might be some question about it. I think the evidence should go in, and after it is all in, I will instruct the jury as to the admissibility.

Exception reserved by Plaintiff's Counsel.

By Mr. Lewis:

Q. Doctor Walke, was that bill paid you by the Kansas City Southern Railway Company?

A. Yes, sir.

Q. Five hundred dollars?

A. Yes, sir.

Q. Those were services rendered Mr. Ellzey?

A. Yes, sir.

[fol. 223] Q. I will ask you, Doctor, if that is a reasonable charge for the work that you did?

A. I am sure it was.

Q. Doctor, you were more or less familiar with the accommodations furnished Mr. Ellzey at the Schumpert Sanitarium?

A. Yes, sir.

Q. I will ask you if, as a physician for the Kansas City Southern Railway Company, the bill of the Schumpert Sanitarium was forwarded to you for approval?

A. Yes, sir.

Q. I show you a statement, Doctor——

Mr. Jones: We make the same objection.

The Court: Same ruling. Objection made general and to apply to all similar evidence. Same ruling and exception.

Mr. Lewis:

Q. I show you hospital bill of $1,260.00. Was that bill approved by you?

A. Yes, sir.

Q. I show you a bill of Dr. L. C. Barrow for $15.00, X-ray examination of R. E. Ellzey. Was that bill approved by you?

A. Yes, sir.

Q. I also show you bill rendered by Drs. Willis, Knighton, Garrett and Willis, against the Kansas City Southern Railway Company for $500.00, for professional services to R. E. Ellzey. Was that bill approved by you?

A. Yes, sir.

[fol. 224] Mr. Jones: I object to all of this evidence.

The Court: Same objection and ruling, and exception.

Mr. Lewis: If Your Honor please, the book-keeper at the Schumpert Sanitarium was one of the Sisters out there, but counsel will admit that she will testify that the hospital bill was paid by the company.

Mr. Jones: Subject to my objection and exception, I take Mr. Lewis' statement of what she would testify.

The Court: It is admitted that the bills were rendered and paid by the Railway Company, subject to the objection previously urged as irrelevant.

Mr. Jones: We have two positions with reference to that; first, that if the man was injured by their carelessness, then they owe the bill; in the second place, that they took him out of the hands of the Government and undertook to treat him. We don't object to the amount or anything like that.

The same admission is made with reference to the bill of $500.00 of Doctors Willis, Knighton, Garrett & Willis. All the bills offered and filed in evidence.

By Mr. Lewis:

Q. Doctor Walke, Mr. Ellzey was not employed by the company and was not entitled to the hospital associations' benefits under the rules of the company, was he?

[fol. 225] A. No, sir; the contract with the company is that it shall be an employee or a passenger.

Q. Or a passenger?

A. Yes, sir.

Q. Now, this bill; I will ask you if that bill was not paid by the Kansas City Southern Railway Employees hospital association, which in turn was repaid by the K. C. S. Railway Company?

A. Yes, sir.

Mr. Jones: Is that correct, Mr. Lewis?

Mr. Lewis: Yes, sir.

Mr. Jones: I intended to ask him that.

The Court: Have you identified those bills?

Mr. Lewis: For the purpose of identification, counsel marks the bill of Dr. T. C. Barrow, "D-2," and the Bill of Doctors Willis, Knighton, Garrett and Willis, "D-3", and the bill of Dr. Frank H. Walke, "D-4", and the voucher for the hospital bill, "D-5", and ask that these be filed in evidence.

Mr. Jones: Subject to the objection.

The Court: All right.

(Documents filed in evidence as marked.)

[fol. 226] Cross-examination.

By Mr. Jones:

Q. Doctor Walke, were you directly or indirectly connected with the Railroad as surgeon and physician prior to the time Mr. Ellzey was hurt?

A. Yes, sir.

Q. You were not employed specially for this case?

A. No, sir. The thing was this: to make the thing clear: I am Chief Surgeon of this Division, from De Queen, Arkansas to the Gulf; and it was a question of the Railroad— It was a question of whether he was an employee of the Government or whether he was an employee of the Railroad—

Q. You are taking up a lot of unnecessary time. The point I want of you is that you were connected with the railroad prior to that time.

A. Yes, sir.

Q. Now then, when Ellzey was hurt, you got a message from a man to be on hand to take charge of him when he arrived at the hospital.

A. Yes, sir.

Q. He arrived at the hospital about eight o'clock at night?

A. It was earlier than that; about seven o'clock.

Q. And you were there?

A. Yes, sir.

Q. And took him in the operating room and gave him such treatment as you could without putting him under a general anæsthetic?

A. Yes, sir.

Q. You found him in a case of apathetic shock?

A. Yes, sir.

Q. And it would really have probably been dangerous to have put him under an anæsthetic for any considerable treatment at that time?

[fol. 227] A. Yes, sir; and that was my judgment.

Q. In other words, you would not have liked to take the responsibility at that time of putting him under a general anæsthetic, would you?

A. No, sir.

Q. And so you gave him the best treatment you could under the existing conditions?

A. Yes, sir; exactly.

Q. That is your opinion?

A. Yes, sir; that is my opinion.

Q. Of course, you might have put him under a general anæsthetic and might have come out all right, and then he might not have come out all right?

A. Yes, sir.

Q. And if he had died he would have been dead a long time?

A. Yes, sir.

Q. So you followed your judgment in that respect?

A. Yes, sir.

Q. In other words, he received just the kind of treatment that your views of his condition suggested that he should receive?

A. Yes, sir.

Q. Then, the next day, of course [course], he had probably recovered somewhat from that apathetic shock?

A. Yes, sir.

Q. He had sufficiently recovered until you were willing to put him under a general anæsthetic, next day?

A. Yes, sir.

Q. When I say "recovered," I mean from the shock?

A. Yes, sir.

Q. This shock was brought about by the loss of blood and the suffering that he had endured?

A. Yes, sir.

[fol. 228] Q. It was both a physical and psychological shock?

A. Yes, sir.

Q. The condition he was in was really that which would bring about a great deal of suffering, was it not?

A. Yes, sir; good deal of suffering to all compound fractures.

Q. The history of his case is—I will not go very much into it, because there seems to be no dispute about it. That you put it up in splints, that Mr. Hilloy learned somewhere was a Thomas splint?

A. Yes, sir; Thomas splint.

Q. And you watched after it, and it became infected?

A. It was already infected when it started.

Q. Infected when he got there?

A. When he got hurt. It was infected when he was injured, with all of that oil and dirt in there, and when he got to the sanitarium it was already infected.

Q. He had infection in the sense that it had a lot of foreign substance in it?

A. Yes, sir.

Q. And you proceeded to set up housekeeping promptly?

A. They were there all the time. I never, from the time I got him.

Q. It was really an infected condition at that time?

A. Yes, sir.

Q. And according to your judgment, nothing could have been done to keep infection from setting up?

A. Yes, sir. We did all within our power. We used powerful antiseptics, etc.

Q. And then to heal all of this, surrounding?

A. Yes, sir.

Q. And then, of course, you looked after him according to your judgment and opinion right along?

A. Yes, sir.

[fol. 229] Q. And he has had the proper treatment, as you see it?

A. Yes, sir.

Mr. Jones: That is all.

Redirect examination.

By Mr. Lewis:

Q. Did Mr. Ellzey have any malady that would retard his condition and prevent those bones healing?

A. Yes, sir; the Dengue epidemic came on at that time, and we all had it. That was one infection that got the best of all of me. I personally was down 28 days with the Dengue; and there are 104 doctors in the City of Shreveport and there was 102 of them that had it. It was impossible to get doctors in the City of Shreveport. I was down, and practically every man on the Kansas City Southern was down. And then when I got up Mr. Ellzey got the Dengue himself, which delayed the operation, and those were extra delays in which the pus germ grew.

Mr. Jones: I don't see the materiality of that testimony.

Mr. Lewis: That was not in response to my question.

The Court: State your objection, Mr. Jones.

Mr. Jones: My objection is that that they inflicted the injury and that they were responsible for the results that flowed from the injury, and if a subsequent malady that [fol. 230] passed through the country added to the injury, that that does not relieve them of responsibility—of course, if they are liable at all or responsible for any part of the injury or damage that resulted from the injury. He is not entitled to recover for having the Dengue fever, but he would be entitled to recover for any damage that the Dengue fever caused this injury.

The Court: The rule you stated is applicable to the condition at the time the injury is received, but I have no doubts whether it would apply to a case where, after the party was injured, a particular malady invaded the country and the party caught it, because he might have caught it just

the same, whether he was well or sick. But in the case where he had it at the time of the injury, and it served to aggravate it, that would be the approximate cause whereas, in the other case it would not. I don't think the evidence is relevant.

Mr. *Jones*: The point is this, that he cannot recover damages for any inconvenience or suffering occasioned by the Dengue fever, and that would have been suffered had he not been injured. In other words, the railroad is not responsible for the Dengue fever causing him to suffer pain or anything else, but if the Dengue fever aggravated his condition, don't you see, aggravated a condition that was negligently brought to him by the railroad company, the railway company cannot take credit for that aggravation.

The *Court*: Well, that depends upon the facts. The objection is overruled.

To which Plaintiff reserved an exception.

[fol. 231] The *Court*: That would depend upon whether it rendered him more susceptible to the disease than he would have been in normal condition. If the facts show that he would have been just as susceptible to the Dengue without the wound, certainly you cannot recover for what the Dengue did.

Exception reserved by Plaintiff.

Recross-examination.

By Mr. *Jones*:

Q. Doctor, the Dengue fever is a disease that affects the whole person, so to speak?

A. Yes, sir.

Q. It is attendant with high fever and aching bones—used to be called "break-bone fever"?

A. Yes, sir.

Q. And I expect, more description of what it is than "Dengue"?

A. Yes, sir.

Q. In case its course ordinarily is how long?

A. Usually, five to seven days is the ordinary time; but then, there is the extraordinary cases where you could not

take care of yourself, say, like I was; went to bed with 107 temperature and was down 28 days. I know that the effect lowered the vitality to such an extent that in my surgical cases were longer getting well, after the surgical operation, after the Dengue.

Q. The Dengue fever, then, would aggravate——

A. The wound.

Q. The surgical condition?

A. Yes.

Q. In other words, it is your idea that Mr. Ellzey's condition in his leg was aggravated by reason of his having the Dengue fever?

[fol. 232] A. Yes, sir.

Q. Now, if he had had Dengue fever—If he had not been injured and had the Dengue fever, he would not have produced pus in his leg?

A. No, sir.

Q. It would not have produced broken bones?

A. No, sir.

Q. And it would not have produced any condition that Ellzey suffered from in the leg?

A. No, sir.

Q. It merely encouraged the work of the germs that were already in there?

A. Yes, sir; and lowered his resistance.

Q. Lowered his resisting power?

A. Yes, sir.

Q. Pus in a wound, everybody knows, is caused by germs?

A. Yes, sir.

Q. And it is a destructive process of the glands and tissue and muscles, is it not?

A. Yes, sir.

Q. In other words, it is a destructive process of the particular part that is attacked—ordinarily, the glands, tissues, nerves, and muscles, however, but it may attack the bone?

A. Well, we call it "bone tissue." I think that was what you had reference to.

Q. If Ellzey was a passenger, he was entitled to free treatment; did I understand that to be the rule?

A. No.

Mr. Lewis: I object to any conclusion like that.
Mr. Jones: I just wanted information.
[fol. 233] The Court: Find out what the facts are.

Witness:

A. No, sir; a passenger injured on one of our roads by a wreck, we take care of them.

By Mr. Jones:

Q. You would take care of him free of charge? That is the point I wanted to make?

A. It entirely depends upon the conditions—I mean, the circumstances of the accident. We try to learn—You see, the Hospital Association of the K. C. S. is operated by the employees themselves, of the railroad company, and the railroad company is independent of that.

Q. I knew that.

A. Well, and then if a passenger is injured as a passenger, and we are called on to treat them, why we give them that service. I don't know whether the railroad collects for them or not.

Q. You don't know?

A. I don't know.

Q. You did take charge of him under instructions from the Railroad Company?

A. Yes, sir.

Mr. Jones: That is all.
Mr. Lewis: That is all.

By the Court:

Q. Would the fact that the man was wounded render him any more susceptible to Dengue fever than if he did not [fol. 234] have the wound, other than lowering the vitality?

A. That is a hard question, Judge. It was such an epidemic that those that were well had it, as well as those that were injured, and it was what we call an epidemic, and I would not like to go on record as making any positive statement.

Q. It would be purely a matter of guess or opinion?

A. Yes, sir. But we know it would have lowered his resistance to a point until his wounds would not heal as quick.

Recross-examination.

By Mr. Jones:

Q. Doctor, it is known that every person who gets Dengue infection does not develop Dengue, is it not?

A. Well, I don't know. I really don't know whether I could answer that question.

Q. Isn't it like malaria; that you may get the infection and not develop the condition?

A. No, sir; I don't think so. It is no doubt an infection disease, and if you get the germ you are down.

Q. It is a mosquito infection?

A. Yes, sir.

Q. It has got to be carried by a mosquito?

A. Yes, sir; the mosquito must be infected.

Q. The mosquito must be infected and he must bite the man in such a way as to communicate the germ?

A. Yes, sir.

Q. You would not say that all of them bitten by the infected mosquito had the disease?

A. I could not say.

[fol. 235] Q. You do know that any one whose vitality is low is more susceptible to every germ disease than is a normal man?

A. The ordinary disease, but not one of that kind, or what we call indemite disease like that was. For instance, the Dengue was the worst epidemic that I have experienced in my career.

Q. Yet all of the people didn't have the Dengue? Some of them escaped?

A. Mighty few.

Q. You would expect the robust people to come nearer escaping than people whose vitality was low?

A. Theoretically, you would; but practically, it went harder with the larger people than any one else.

By the Court:

Q. Doctor, you have stated in your testimony that the operation was postponed until the next morning at the request of the plaintiff and his father?

A. Yes, sir.

Q. Now, if the operation had been performed that night immediately on arrival at the hospital, would, in your opinion, the conditions have been different, in so far as his infection and the subsequent prolonging of the process of curing it or healing up the wound?

A. Theoretically, it would, but practically, it would not.

Q. But it is a fact, in your profession, that if you get hold of a patient immediately and cleanse the wound and get the infection out, there is less likelihood of developing a condition that we have in this case?

A. Yes, sir.

Q. The injury having happened somewhere about 1:30 in the day and he reached the sanitarium between seven and [fol. 236] eight o'clock at night, would the conditions that had developed up to that time been calculated to produce the same results as were produced, when the operation was postponed until the next day at eleven o'clock?

A. I think it would.

The Court: All right.

Recross-examination.

By Mr. Jones:

Q. As I understand it, Doctor, while they objected to treating him that night, to operating on him that night; that was also your judgment, too?

A. Well, I said it should have been put off. I could have given him an anesthetic and pulled this in place and got those fragments out. What I wanted to do was to get a drain in before the bug got there—that is, I wanted to get a drain into the healthy tissue. I would have drained that off by putting in a drainage twelve hours earlier.

Q. But it was your judgment, in his particular condition, not to give an anesthetic?

A. It was.

(Witness excused.)

Whereupon, the defendant rested, and counsel for the plaintiff announced that he had no rebuttal evidence, and the evidence was closed.

The defendant, through its counsel, thereupon filed a motion for an instructed verdict in favor of the defendant, [fol. 237] which motion was overruled by the Court, and to which ruling of the Court the defendant reserved a bill of exceptions and the right to attach thereto the entire evidence in the case.

Evidence filed Nov. 19, 1924.

Whereupon, after argument of counsel for both sides, the Court charged the jury as follows:

CHARGE TO JURY

Shreveport, La., Oct. 28, 1924.

GENTLEMEN OF THE JURY: This is a civil cause, in which the plaintiff, alleging himself to be a resident of this state, sues the defendant as a foreign corporation or entity, domiciled outside of the state but having an agent in this state for the service of process. That is what gives jurisdiction to this Court—diversity of citizenship.

In substance, the plaintiff charges that he was employed as a deputy—that is, in an original, first and second amended petition, which I will give in substance in a recital of plaintiff's case, as propounded by his suit. The plaintiff alleges that he was employed by the United States Marshal of this district to assist in protecting the property of the defendant company during a period of strike—that is, when the regular employees of the defendant company had [fol. 238] ceased to work, and the company was attempting to operate its trains with other help; and for that reason it became necessary for the Government to afford protection to property of this kind operating in interstate commerce. As a result of that employment, he further alleges that he was assigned by the Marshal, along with deputy Marshals, to this particular railroad company purpose stated; that he was placed under the direction and control of the management of the railroad company, to be used in whatever locality it might become necessary for the protection of property of the defendant company; that pursuant to that arrangement, he was directed to accompany certain of the employees of the defendant company on a trip intended to

locate certain trouble with the telegraph wires of the defendant company, and in the course of that trip, was required to use whatever means of transportation might be most available for the performance of that duty. He further contends that he was instructed and directed, and had the right to ride either upon the trains of the company as a passenger, upon its engines, upon its freight trains, or any other means or mode of conveyance that might be most convenient for the purpose of performing the duties to which he had been assigned; and that accordingly, he proceeded to a certain point on the railroad company's line and commenced an investigation of the trouble which it was intended to locate; that part of the time he travelled on the train, and thereafter, it became necessary, according to his contention—and I am now simply reciting the case as propounded by the plaintiff—that it became necessary for him to accompany the man who was to perform the work, upon a motor car. Understand, gentlemen, it is not contended that the plaintiff in this case was an employee of the de- [fol. 239] fendant company in the sense that he was performing any of the duties of operating or aiding in the upkeep of the company's property; but merely that he had been assigned as a guard to protect the company's employees against interference by the strikers or others who might be disposed to prevent the performance of their duty); that as a result of that undertaking, the man to whom he was assigned for the purpose of guard duty, procured a motor car belonging to the defendant company, and proceeded up the line for the purpose of locating the trouble; that they stopped at various points and investigated, and eventually located the trouble at a particular point; that the trouble was repaired; that the motor car on which they were travelling was defective in some respects, and it became necessary to repair the car, which was done; and that thereafter, the employee of the company, to whom he was assigned to guard, found it necessary to carry the motor car back to a point where it could be properly housed or removed from exposure or damage by the strikers or those who might damage it; and that while in the course of this trip, after completing the work, to the destination where

the motor car was to be stored, he was injured or received the injuries for which he brings this suit.

Now, his contention is that his injuries were caused by the fault of the company, the defendant; that is, through its agents or employ, in that the car was defective; and further, that the employee who was operating the car, to whom he was assigned as a guard, was guilty of carelessness and negligence in the operation of the said car, in that it was run at too fast a rate of speed and jumped the track causing the injuries which he suffered.

He further alleges that as a result of those injuries, which he attributes to the negligence of the defendant, he [fol. 240] has been danaged in the sum as alleged in the petition, of sixty thousand dollars.

Now, that plea is met on behalf of the defendant with an admission that the plantiff was a deputy marshal, but the defendant denies that he occupied the relation of an employee or was under any form of contract or agreement with the defendant conpany; that his duties were those of a marshal or deputy marshal, over whom the defendant had no control, no power or control, and therefore the defendant was not responsibe for what he did; that the plaintiff had no right to use a motor car for the purpose of traveling upon its lines; that he was, in a measure, a trespasser, or at best, a licensee, to whom the defendant owed no duty other than to refrain from wilfully injuring him; and further, the defendant denies any negligence in the condition of the car, or on the part of the defendant's employee while he was in the course of his duty. It is further contended by the defendant that at the time the injury occurred, the duty which the employee was performing had been completed, and that it was no longer necessary to use the motor car or to make any further trips upon the railroad company's line, and that it was the duty of the employee, well known to the plaintiff in this case, to cease the use of the hand car or the motor car, and to catch the local passenger train at the nearest point available. The defendant also contends that the plaintiff in this case was himself responsible for the accident, in that he directed and controlled the man Merchant who was operating the car and instructed and directed him to use it for the purpose of going from

De Ridder to Leesville, and that whatever carelessness or acts of that nature were performed or committed on the part of the employee, were done at the instance of the plaintiff, and for that reason contributed directly to the [fol. 241] injury in this case, and hence, plaintiff cannot recover.

Now, in addition to a denial of liability based substantially upon those grounds, the defendant denies the extent of the injury contended for by the plaintiff in this case—the values of the injury. They deny that he has been wholly incapacitatd. They contend that he has been only partially incapacitated, and that if you should find that they are liable as a matter of fact, applying the law given you by the Court, then that he should recover only such sum as would make up the difference between what he is able to earn today and what he would reasonably have earned if it had not been for his injuries. In addition to that, the facts are considerably disputed upon the question of the amount of injury or the value of his services, etc., and that is a matter I will discuss a little further on.

Now, gentlemen, the function of the jury in these cases is primarily to decide the facts. In other words, you are the sole judges of the facts, and any comment that the Court may make upon the facts is not binding upon you, but it is your duty to take the law as given you by the Court and apply that law to the facts as you find them.

Now, taking up in a general way the evidence introduced in this case, gentlemen, according to the best of my recollection it is substantially this: the plaintiff has shown by his witnesses, or at least witnesses have so testified, that he was employed by the Marshal's office; that he accompanied the employees, among which or one of whom was this man Merchant, out upon the line of the defendant company and discharged his duty as guard in guarding those employees while they were performing their duties upon the line of the company. And his evidence also shows that he did [fol. 242] accompany the defendant's agent in this case, and guarded him while he was engaged in locating the trouble upon the line; that the motor car was used; that the first car they attempted to use would not work, and that subsequently they used another and proceeded to locate and repair the trouble. And according to his testimony,

after the trouble was repaired, Merchant claimed that it was necessary, in order to get the car to a place of safety and out of the way of those who might damage it, to proceed to Leesville, where it might be placed in a house; and that the reason for making the trip to Leesville was as stated by the agent, to put the car in a house where it would be protected, and that the plaintiff simply accompanied Merchant for the purpose of protecting him, as he conceived it to be his duty to remain out with him so long as he was out upon the line; and that he, in the first place, had no knowledge of the operation of the car, no knowledge of the necessities of the situation, and that he held himself in readiness to comply with whatever was required on the part of those that he was guarding.

Now, that is substantially his evidence. And he has introduced testimony of other witnesses to support that to some extent. On the other hand, the defendant has produced witnesses here, whose testimony tends to indicate in a measure that there was on authority for the use of this car; that that was a decision which was taken by Merchant after leaving the City of Shreveport, and that in using the motor car he perhaps had no authority from the railroad company for its use; that even conceding that the car had been used with authority, that at the time the injury happened, the mission had been performed, and that plaintiff himself insisted upon using the car for the purpose of going to Leesville; that he made certain remarks to the effect that [fol. 243] he would go there if the car would stay on the track; and that he was the one who insisted upon making the trip, and insisted upon the car being run at a high rate of speed.

Now, that is the evidence that is offered on the part of the defendant. You are confronted, gentlemen, with the duty of deciding the facts. What I have mentioned constitutes the proof offered on either side of the case, and the duty is up to you to decide what the facts are in the case. As I stated in the beginning, your duty consists of deciding the facts, applying the law as given you by the Court.

Now gentlemen, in deciding what the facts are and whose testimony is to be believed in a cause of this kind, you have the right to call to your assistance your experience as

reasonable men, and to weigh the evidence of any witness, as measured by the rule of ordinary, reasonable experience. You have the right to decide from the appearance and manner of the witnesses upon the stand whether or not they are telling the truth. You have the right to consider whether their statements are corroborated by the other evidence in the case. You have the right to say whether there are physical circumstances in the case, proven or admitted; or if there are admitted facts in the case which do or do not corroborate the statement of any given witness. In other words, you are the judge, to say whether a witness has truly represented the situation or whether that witness has falsified. You have a right to believe such part of the testimony as you see fit. You have the right, if you are so convinced that a witness is not telling the truth, to disregard his testimony. And that rule applies either to the witnesses for the plaintiff or to the witnesses for the defendant. In other words, you attempt as best you can, from your [fol. 244] experience, to analyze the evidence and weigh it all and say what the facts are; what are the reasonable conclusions under the circumstances of the case, and having done that, to decide which contention with respect to the fact presented by the plaintiff or defendant is true or false. Those are substantially the rules to apply to a determination of the facts.

Now, once you have determined the facts in the case you come to the question of applying the law. Now, coming to the question of the application of the law to the facts in the case, gentlemen, you must bear in mind that the plaintiff carries the burden of making out his case. In other words, the defendant does not have to defend or produce evidence to dispute plaintiff's case until the plaintiff has made a case requiring such proof. In other words, the plaintiff must make out his case by a preponderance of the evidence. And by that is meant such a state of facts as reasonably and fairly establishes what he contends for, with such certainty, as reasonable men, you would be fully convinced that a case had been made out, and that he was entitled to recover.

Now, then if, weighing the facts, you should find that the plaintiff in this case was employed by the United States Marshal, at the instance and request of the defendant com-

pany, for the purpose of protecting its property, and that he, accordingly, was sent out upon its lines for the purpose of guarding the defendant's property, and while in the discharge of that duty, he was injured through the fault and negligence of the company, and without any fault upon his own part, then you would have a state of facts, applying the law, which would justify you in finding for the plaintiff in the case. On the other hand, if weighing the evidence as a whole, you should decide that the evidence was equally balanced; that is, that the evidence on the side of the de- [fol. 245] fendant off-set that on the side of the plaintiff, so that there was not a fair preponderance in favor of the plaintiff, then you would have to decide the case in favor of the defendant, because of the rule of law which requires the plaintiff to make out its case by a preponderance of the evidence.

Now, coming more specifically down to what, to my mind, involves the crux of this case, we reach the situation which arose after the completion of the work. As I said before, you are the sole judges of the facts; but I am convinced from the evidence that up to that point the plaintiff was in the situation which necessitated all of the reasonable care which the defendant would be compelled to afford to a passenger traveling upon its line. In other words, I think the evidence reasonably established that this car was operating with authority of the railway company up to the point of making the repairs; that it was used in its benefit, and that there was not a sufficient showing in the evidence here to destroy the idea or proof administered by the plaintiff, that the car was being operated by the defendant's agent for the defendant's benefit, up to that time.

So that you come down now to the question of what the facts are, and what the law is from that point on; and that is a part of the facts that I am going to leave entirely to you gentlemen. I am not going to attempt to sway your judgment one way or the other as to what you think about the facts from the time that he left DeRidder, or left this point, Carson, I believe it was, or whatever place it might have been, where the trouble was found and where the mission of repair work was done.

I will state this, at this point; that if you find, as I said the evidence indicated to me, and which is a fact you have

the determination in regard to, that the plaintiff was trans-
[fol. 246] ported by the railway company—that is, through its agent, or this particular representative (Merchant), with authority, to the point where the damage to its line was repaired, then it was the duty of the railway company to have conveyed him back to the point from which he started—or in other words, back to some place where, either by that means or by the use of some other conveyance he could reach the point from which he left. In other words, when he started out there was one end in view and that was the performance of work that was to be undertaken and to return to whatever point might have been necessary to the plaintiff. And the same duty and the same responsibility rested upon the defendant to return the plaintiff to the point from which he was taken as it did to exercise reasonable care in conveying him along the line in the discharge of the duty to which he was assigned.

Now, then, gentlemen, it is up to you to say whether the plaintiff in this case should have stopped at DeRidder or stopped ot Carson and caught the train there, rather than to undertake the journey from there on to the point where he was injured in the motor car.

Now, if you should find that the plaintiff in this case had no knowledge of the necessities of the situation; if you find that the defendant's agent represented that it was necessary that the additional journey be taken to Leesville for the purpose of storing the car, and that the plaintiff had no other option in the matter under his instructions and his arrangements by which he was furnished to the defendant company, then to accompany the lineman and protect him during that journey, and that he personally was guilty of no negligence himself; that he in no way contributed to any improper operating of the car, and he was injured by [fol. 247] the defendant in this case because of a faulty or defective condition of the car or because of an excessive running of the car at an excessive rate of speed, then you would have a case which would require that you render judgment for the plaintiff. On the other hand, gentlemen, if you are convinced that at the time the plaintiff and the lineman reached De Ridder or Carson, and the work had been completed, and that it was the most reasonable point

at which to take the train, on the part of both; that it was unnecessary on the part of or duty of the lineman, or of the plaintiff to accompany the lineman, in the performance of the duty to take that car anywhere else, and the journey was made from thence on solely for the convenience of the plaintiff, then you would have a case which would justify you in rendering a verdict for the defendant. In fact, it would be your duty to find for the defendant under those circumstances.

Now, to my mind, that is the crux of this case, is to determine who was responsible for the trip from De Ridder or Carson, undertaken, to Leesville, during which the injury occurred.

It does not seem to be disputed much on one side or the other that the car was being operated at a very high rate of speed. That, I take it, is virtually admitted on both sides; but the question is, who is responsible for it? If the defendant's agent was responsible for it; if he had control of that car, and if the plaintiff in no wise urged or contributed to the fast running of that car, then the plaintiff would be entitled to recover, but if the plaintiff did urge the operation of that car at a fast rate of speed, or if he contributed to it in any way; or if, after seeing the danger, or knowing that the car was being operated at an excessive, wild rate of speed, he had reason to believe that an accident would happen and that he would be injured [fol. 248] thereby, it was his duty at the first opportunity available to him, to refuse to continue in such dangerous situation, and thereby avoid the danger to himself. But these are facts which you gentlemen, as judges of the facts, must determine for yourselves.

Now, there are certain charges requested. Gentlemen, I think I have substantially covered the law of the case. A repetition of the general principles I have suggested are calculated to more or less confuse the jury, but there are some of these special charges, both for the plaintiff and for the defendant that perhaps might elucid*d*ate the matter in some measure, and for that reason, I will give some of them.

Now, Gentlemen, on the part of the plaintiff, these charges are requested: The plaintiff assumed all of the risk im-

mediately incident to the operation of the motor car in carrying passengers thereon, and if he was injured by reason of risk ordinarily incident to the operation of a motor car, he cannot recover. In other words, if the injury is one which could not be foreseen, and the defendant exercised all reasonable care, and the facilities or machinery afforded for making the trip were all that were required, and if the accident happened regardless of such precaution, then that would be one of the risks which the plaintiff would take, and on which he would not be entitled to recover. However, in this connection, you are instructed that the plaintiff did not assume the risk of injury resulting from the defective condition of the car or the operation of said car in such condition if the defendant knew of such defective condition, or in the exercise of care could have ascertained such defective condition thereof; nor did the plaintiff assume the risk of being injured by reason of the negligence of any of the agents or servants or employees of the defendant. You are instructed that inasmuch as the plain-
[fol. 249] tiff was a passenger—that is, in the beginning, gentlemen. The question of whether or not he was a passenger at the time of the accident is one for you to decide. In other words, as to whether or not the relation had ceased at that time, and he and Merchant, the lineman in this case were engaged in a mission of their own convenience, for their own purpose and not for the necessary benefit of the company or for the completion of the work which they had undertaken.

You are further instructed that inasmuch as the plaintiff was a passenger, a failure on the part of the said defendant, its agents, servants and employees to exercise a high degree of care for his safety would constitute negligence upon the part of the said defendant.

Again, you are instructed that the plaintiff would not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence so situated would have abandoned the car.

With reference to the defense of contributory negligence, you are instructed that it was the duty of the plaintiff to

exercise ordinary care; that is, such a degree of care as a person of ordinary care and prudence would exercise under the same or similar circumstances to avoid injury to himself, and failure on his part to do so would constitute contributory negligence.

Now, in this connection, you are instructed that the defendant contends that the said Merchant was operating the said car over its track at the time of the accident in open violation of the rules and regulations of the defendant, and that the company is not responsible for the result to the plaintiff therefrom.

[fol. 250] Again, you are instructed that if the plaintiff knew that the said Merchant was in fact operating the said car over the track in violation of the rules and regulations of the said company, and if the plaintiff after obtaining such knowledge had an opportunity to abandon said car at a regular station of the said defendant, and negligently failed to do so, then the plaintiff would be guilty of contributory negligence and could not recover.

However, in this connection you are instructed that the plaintiff had the right to assume and to act upon the assumption that the said Merchant would not operate the said car in violation of the rules and regulations of the said company, and unless the said plaintiff knew that the said Merchant was in fact violating the rules of the said Company in operating the said car and acquiesced in and agreed thereto after an opportunity to have abandoned the said car at a station of the defendant, he cannot be held to be guilty of contributor- negligence.

Again, you are instructed that the burden is upon the defendant to establish contributory negligence upon the part of the plaintiff. In other words, gentlemen, primarily, it is the duty of the plaintiff to prove negligence on the part of the defendant, but when the plaintiff has made his case, then the burden is shifted to the defendant to meet the case made by the plaintiff, and in doing so, is entitled to urge what is termed contributory negligence—that is, that the plaintiff, notwithstanding the defendant's negligence, was guilty of carelessness himself, which contributed directly or approximately to the injury. That is what is meant by contributory negligence.

In this connection you are further instructed that if the said plaintiff commanded, directed or encouraged the [fol. 251] said Merchant to operate the said car at a dangerously high rate speed, and that the said plaintiff knew that it was dangerous for the said car to be so operated at such high rate of speed, and if by reason of such command, direction or encouragement on the part of the plaintiff the said Merchant did operate the same at a high rate of speed, thereby causing the wreck and injury, then the plaintiff could not recover, as he would be guilty of contributory negligence.

However, you are instructed that the plaintiff would not be guilty of contributory negligence approximately causing the injury by merely encouraging the said Merchant to operate the said car—I will have to eliminate that, Mr. Jones. That is getting too close upon my deciding the facts for the jury on that point. I am not going to give that part of it. I think I have substantially covered the matter otherwise. In other words, gentlemen, the idea which counsel wishes to convey there, and on which I agree with him in principle, is that if the plaintiff should suggest that the car be operated at a faster rate than that at which it was being operated, which within itself did not constitute apparent negligence, then the fact that he urged the faster speed, if the car was merely going at a low rate of speed, would not be negligence.

In other words, he would have to encourage such rate of speed which within itself, to an ordinary, reasonable man who had the knowledge that the plaintiff had in this case, of the conditions which the evidence shows that he had, that it would be dangerous to so operate the car. In other words, he must simply exercise reasonable common sense, and if he knowingly encouraged a high rate of speed, he should be bound to expect the consequence which would flow from the negligence in operating the car, but he would not [fol. 252] be held to such condition, if the extent to which he urged the faster rate of speed did not reasonably, to a man in his situation indicate that it would be dangerous.

In this connection, you are instructed that the plaintiff has the right to assume that the said Merchant knew the speed at which the said car could be operated safely; but

if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate said car at such rate of speed that was not reasonably safe, plaintiff would be guilty of contributory negligence, and could not recover.

Now then, gentlemen, on that point—I will try to dispose of those points just as we pass over them, for both sides, in order not to have to come back to that again. I am requested to give this charge on behalf of the defendant:

"I charge you, gentlemen of the Jury, that while as a general rule the master is liable for the negligence of the servant, it must appear that such fault or negligence on the part of the servant was committed in the course of his employment and the master is not liable for a fault or negligence of the servant committed by him while not prosecuting the work of the master. That is, where he ceased to perform the duty for which he was employed and puts off on some other expedition or uses tools which are put in his hands for his own benefit, and not for the purpose of the business of the company; then he ceases to be an employee of the company, and the company is not responsible for his damage. Therefore, if you find that Merchant, the employee of the Kansas City Southern Railway Company was not acting within the scope of his employment at the time of the accident to the plaintiff, it is immaterial whether Merchant was negligent or not, because the plaintiff cannot recover against the defendant unless Merchant was acting [fol. 253] within the scope of his employment at the time of the negligence charged to have been committed.

Now, the second I will have to give with some modification, Mr. Lewis, as I did some of the charges of the plaintiff.

I charge you, if you find that Merchant was employed by the defendant Company to repair its telegraph or telephone wires, and in doing so, it became necessary for him to use a hand car belonging to the defendant company, that while he was using his hand car in making such repairs, he was acting within the scope of his employment; but if you find that having completed the repairs which he was employed to make, that he continued to use the hand car in conjunction with the plaintiff, not for the purpose of making repairs in question, but for his own convenience in at-

tempting to reach a point satisfactory to him, to take a train and return to Shreveport, that when he did so, that he was not acting within the scope of his employment. In other words, a reasonable latitude was allowed to Merchant and to the plaintiff, to get back to their destination or to a point where this train could be caught and anything that was done reasonably with that end in view with the conditions as they then existed, would be sufficient and within the scope of his duty. But if, after a reasonable chance was offered them—and in stating this to you, I mean to indicate, gentlemen, that if both the plaintiff and the witness Merchant were equally advised of the conditions, and equally had the opportunity of continuing or desisting in the pursuance of the journey, then it was their duty to use the most available means and opportunity of returning to their destination, rather than to adopt some course that would be purely and entirely for their own benefit and convenience.

[fol. 254] I charge you that it is not enough for you to find that Merchant was an employee of the defendant railway company, in order to hold it liable for the accident of which the plaintiff complains. In order to recover for the consequences of this accident, the plaintiff must show, and you must find by a preponderance of the evidence, that the negligence of Merchant occurred while he was doing some act necessary in the discharge of his duties towards the defendant. If you find that the act that he was doing at the time of the accident was not necessary for the discharge — his duties to the railway company, then I charge you that he had ceased to be within the scope of his employment, and for his acts during such time the defendant is not liable. In other words, what I have said before is that the question is to be determined reasonably by what he was doing at the time. It is a fact for you to determine, along with the other facts in the case.

I charge you that if an employee voluntarily leaves the duties which his service required him to perform, and goes into some other position, the master is not liable for any collateral faults committed by such servant while so acting. The doctrine is illustrated by the cases where it was held that a hostler whose duties were confined to feeding and

grooming a horse, and who had no right to ride or drive it, but who drove the horse contrary to instructions and while doing so ran over and killed a child, that he was not within the scope of his employment while driving the animal. In other words, using it for his own convenience.

I charge you that a railroad company is not answerable for the negligence of its servant in transporting persons without express or implied authority to receive them, and if a person or anybody is allowed to ride by an employee [fol. 255] who has no authority to give such invitation or permission, the person carried is a trespasser or a licensee and is not entitled to the protection of a passenger.

I charge you that an employee cannot change or abrogate the rules of the railroad company, and they cannot impose upon their employee, the railroad, the obligation of a carrier, by virtue of taking persons on cars not provided for the carriage of passengers, or as a general rule, by inviting them to ride in dangerous places not intended by the railroad company for passengers to occupy.

I think the rest of those are substantially given, or are more or less a repetition of the principles which I have enunciated.

I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the Town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence.

Now then, gentlemen, coming down to the question of the quantum of damages. In determining--that is, in the event you find, gentlemen, as a matter of law that the defendant is liable for the injuries received by the plaintiff in this case, you reach the question of the amount which could be allowed. Plaintiff is entitled to recover such a sum as will reasonably make him whole. By that is meant such an amount as will put him in the same position that he would have been without the injury, plus such compensation for the suffering, mental and physical that flowed from the in-

jury. And in determining what shall be sufficient to com- [fol. 256] pensate him for his loss of earning capacity—and that is what it really means—you have a right to take into consideration, first, the man's age. And then you have the right to take into consideration his earning capacity at the time he was injured, and consider such facts as have been introduced on his behalf, as well as for the defense, as to what he reasonably earned before the accident; not any unusual situation, gentlemen; where he might have earned a large sum of money for a particular time, but what he was reasonably capable of earning, in view of his situation in life, his education, his physical condition, and all of those things that are elements to be considered in determining his earning capactiy. Of course, the evidence is to be considered as to what he had earned theretofore and what he was being paid at the time. You have a right to consider whether such employment is regular or permanent, or whether it is merely temporary. In other words, try as far as you reasonably can to reach a fair and just basis of calculating his earning capacity. After you have done that, then you can take into consideration the reasonable period of time over which he might have a prospect of living, and decide what that sum will be.

Now, as against any such sum as may have been reached on that basis, you have a right, and it is your duty to off-set any present earning capacity of the plaintiff. If you find that the evidence discloses that he, notwithstanding his injury, is capable of earning an income, that should be offset or compensated against what he should have earned if he had not been injured.

Then you come to the question of his mental and physical suffering. That is a matter which is difficult for the Court or for the jury to determine. It is something that you will have to consider. You will have to consider all of the facts [fol. 257] in the case, the period of time over which he suffered, the continued injuries, the pain and suffering occasioned thereby, the nature of the injuries, and all of those circumstances are to be considered by you in arriving at the question as to what will reasonably compensate the plaintiff for that part of the claim or that kind of damage.

Now, after you have ascertained the sum that will reasonably compensate him for his depreciated earning capacity, then you will determine the amount which could reasonally compensate him for his suffering and injury—that is, on account of physical pain and mental suffering. You will add those two together, and render such judgment as in your opinion would be fair and reasonable.

Now, I cannot attempt to indicate to you what in my opinion that sum should be, but you will consider all of the evidence produced by plaintiff and by the defendant railroad and reach such conclusion on that score as you may see fit.

With regard to such evidence as has been introduced as to any compensation that was paid by the Government, that is a matter which does not concern the right to recover in this case, except, primarily there might be some admission therein that would indicate that the plaintiff had admitted that he is entitled to only so much, fifty per cent compensation. In other words, that his earning capacity had been reduced only fifty per cent. But I think that has been substantially dissipated, and there is no serious contention that that has any particular bearing upon the case.

Now, there is one point which I was about to overlook here, that was given in in writing, on the question of damages. There was some evidence introduced here to show that after the plaintiff went to the hospital he per- [fol. 258] haps acquired Dengue fever, and the question arose as to what extent that contributed to or ag-ravated the injuries or prolonged his period of recovery. Counsel has asked that I give this particular charge on that—counsel for plaintiff: "If you find for the plaintiff, and you also find that he had Dengue fever, you are instructed that you cannot allow him any damages for the suffering directly resulting from the Dengue, and which he would have suffered had he not been injured. However, if plaintiff had Dengue fever, and the same ag-ravated his injury, and if you find for plaintiff, the defendant would be liable for the aggravation of such injury which might have been caused by the fever." In other words the defendant would not be liable for such loss of time or suffering or pain as might arise from the fever itself; but if the fever itself ag-ravated

the injury and caused the injuries, which otherwise might have yielded or from which the plaintiff might have sooner recovered, to be prolonged; then, to that extent that it so contributed, the defendant would be liable.

Now, gentlemen, is there anything else? I have tried, substantially, to cover the case.

Mr. Bullock: Your Honor, they must find a unanimous verdict.

The Court: Yes. It is necessary that all of you concur, gentlemen, in reaching any conclusion, either for the plaintiff or for the defendant. In the event you find for the plaintiff your verdict will be, "We, the jury, find for the plaintiff in the sum of so much." If your verdict is for the defendant, then it will be, "We, the jury, find for the defendant, rejecting plaintiff's demand." Anything else?

[fol. 259] Mr. Jones: The rules as I understand it, generally speaking, require exceptions to be taken to the charge before the jury has retired. I don't care anything about that if I get the benefit of the exceptions.

The Court: Well, the idea in taking the exceptions at that time is to give the Court an opportunity to correct the mistake, if there be any.

Mr. Jones: We except the defendant's first special charge with reference to the definition of when Merchant would be acting in the course of his employment for the reasons that in a case of this kind, having started out in the work that was clearly within the scope of his employment, the master would continue liable to Ellzey for his misconduct until Ellzey knew that he had exceeded or passed beyond the scope of his employment.

The Court: I think my charge otherwise shows that.

Mr. Jones: Well, that is the criticism we have on that charge. The second special charge is largely on the same point, as I remember it. Now then, the third special charge of the defendant, as we understood it, the Court placed upon the plaintiff the burden to show that Merchant was acting within the scope of his employment at the time of the injury. We take issue with that and say—we except to that charge, for the reason that inasmuch as he was in the service of the defendant, and acted in his scope of his employment when Ellzey started out with him, that he con-

[fol. 260] tinued to act within the scope of his employment until he was brought to Ellzey's knowledge that he was exceeding the scope of his authority. In other words, the rule is just the reverse of that which Your Honor stated. You placed the burden on the plaintiff to show that he was acting in the scope of his employment, when as a matter of fact, the burden is on the defendant to show that he was not acting in the scope of his employment.

The Court: The point urged by counsel up to that time takes into consideration a question of fact which is assumed to have been shown by the evidence; and that is that shortly prior to the accident, the lineman, Merchant, was already in the discharge of his duty; and if the record does show such fact, gentlemen, then the plaintiff would have the right to assume that Merchant continued in the employment of his duties, unless physical circumstances and all the evidence apparent to him were such as to advise a reasonable man that he was no longer discharging the duties of his master.

Mr. Jones: That covers that. Now, the fourth and fifth.

The Court: Just a minute. Have you anything to urge to that, Mr. Lewis—to that modification?

Mr. Lewis: No, sir.

Mr. Jones: The fourth and fifth: The mere supposed passenger riding in dangerous places, which we don't think is [fol. 261] material here, because the proof shows that he was a passenger on this car. I had a memorandum here with reference to common dangers from the interruption of contributory negligence, but I think that any criticism I would have on that is cured by other portions of Your Honor's charge. I think you made it very clear as a whole, but I think that in the special charge you instructed the jury that, with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed.

The Court: I think I explained that point very fully.

Mr. Lewis: Your Honor please, we requested that charge No. 20, which would cover the question of contributory negligence, in the event they should find that Merchant was acting within the scope of his employment in making the trip to Leesville.

The Court: Well, I think that has already been substantially covered, but I don't see any objection to it. I charge you, gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the handcar fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive [fol. 262] rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the handcar was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the hand-car at an excessive rate of speed. In other words, if he induced or requested Merchant, gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery.

Mr. Jones: We understand your Honor's position, but we merely reserve an exception to that question, as a matter of law.

The Court: All right:

Mr. Lewis: I call the Court's attention to charge No. 26; the last charge.

The Court: Gentlemen, that is right. I had overlooked this. In the event you may find that the defendant is not liable on the facts and the application of the law as disclosed in this case, and you decide to reject the plaintiff's demands altogether, then you would have the right to con- [fol. 263] sider such evidence as has been presented here by the defendant to support the defendant's claim for recovery for such amount as was paid in doctors' bills, nurses' bills,

sanitarium charges, etc., afforded to the plaintiff. And if you do find that those service were rendered at the request of the plaintiff or under circumstances which reasonably implied that he was to be charged therefor, and that he was to pay therefor, then you should give a judgment for the defendant for the amount shown to have been due under those circumstances. In connection with that incident I give this charge 26 asked for by the defendant: I charge you that if you find that the railway company, at the plaintiff's instances and request, paid hospital bills or for medical services rendered to the plaintiff, that then in such event, the defendant is entitled to recover of plaintiff the just costs so paid by it.

Mr. Jones: That is, if the plaintiff's demand is rejected in whole?

The Court: Yes, I prefaced my remarks in connection with the charge. That is in case you find no liability on the part of the defendant.

Mr. Jones: We take exception to that charge 26, because there is not sufficient evidence to raise the issue.

The Court: Well, that is a matter to be decided by the jury.

Mr. Lewis: Your Honor, I think, by your own instructions has covered the points that we submit, as well as I [fol. 264] can recall, but I am not sure about our instruction four, eight and nine; and therefore——

The Court: I didn't give all of those. Most of those are accumulative.

Mr. Lewis: I just wanted to reserve my rights by taking an exception to failure to give those, though I think that you gave them.

The Court: I have covered the points. I did not give them in the exact language, but I have already covered all of those points.

Mr. Lewis: I just wanted to protect my rights and take an exception.

The Court: All right.

Mr. Jones: Of course, the plaintiff excepts to the failure to give special charges requested.

The Court: All right.

Mr. Lewis: The defendant also excepts to all special charges requested by it and not given.

[fol. 265] The Court: Gentlemen of the jury, you elect your own foreman and let him endorse on the petition the verdict as you find it; either that "we the jury find for the plaintiff for so much," or "We the jury find for the defendant, rejecting plaintiff's demand." Or if you find that the defendant is entitled to recover anything from the plaintiff on account of the reconventional demand, your verdict should read, "We, the jury find for the defendant and against the plaintiff for — dollars," or whatever sum it may be.

You may retire, gentlemen.

(The jury then retired to consider of its verdict, and later returning into open Court, the plaintiff and his counsel and the defendant's counsel being present, the jury asked for further instruction, and the following occurred:)

Foreman of Jury: We want to know what would constitute "contributory negligence" on the part of the plaintiff.

The Court: Well, I don't suppose that there is any objection by either side to further elucidating the question of law. Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that contributes approximately to the injury. In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself which reasonably contributes to the injury, approximately, then that is what is known as "contributory negligence." For instance, if a man—a railroad train was being operated without a proper lookout at a crossing, and a person with no regard for his [fol. 266] own safety, carelessly walked upon the track in the face of an approaching train, and was struck, that would be, in law, contributory negligence; or in any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. In other words, if in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agents, who, though found from the evidence, were acting within the scope of the employment but

notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery. The burden of proving contributory negligence rests upon the defendant. It is a special defense specially pleaded, and must be supported by the evidence, by a fair preponderance, just as the plaintiff must support the charges of negligence on the part of the defendant by a fair preponderance of evidence.

I believe that substantially covers the point upon which you desire instructions.

Foreman of Jury: We also want to know how many different verdicts we can bring in.

The Court: Well, in this case, gentlemen, on the question of legal liability of the defendant or the plaintiff, I think there are three verdicts which may be rendered. If you [fol. 267] should find that the defendant is liable as a matter of law and fact—you having decided the facts, and applying the law as given you by the Court—then your verdict should be for the plaintiff, for such an amount as you may think the plaintiff entitled to recover. On the other hand, if you are not convinced that the plaintiff has made out a case by a fair preponderance of evidence showing that the defendant was liable in damages, then you may render a verdict merely for defendant, rejecting plaintiff's demands. That would be the second verdict. If you find from the evidence introduced in the case, applying the law as given by the Court, in addition to the want of liability on the part of the defendant, that the defendant had made out its case in reconvention or upon the claims to be reimbursed for medical services, hospital bills, etc., afforded the plaintiff by his request, then you might render a verdict in favor of the defendant for such amount as in your judgment is shown to have been expended at the plaintiff's request. In other words, three judgments; first, for the plaintiff in such amount as you might find that he is entitled to recover; second, for the defendant, merely rejecting the plaintiff's demand; and third, for the defendant, assessing plaintiff for such sum as you might find the

railroad company was entitled to recover and against the plaintiff. All right, gentlemen.

Mr. Jones: With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circum- [fol. 268] stances, having the opportunity and information, etc., the plaintiff had at the time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that Your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient.

The Court: To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued, or he must have omitted to do something which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had [fol. 269] before him at the time a man placed in his posi-

tion must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence. I think that covers it.

Mr. Jones: There is no plea of an omission to check the speed of the car, if Your Honor please.

Mr. Lewis: There is, Your Honor.

Mr. Jones: Is there?

Mr. Lewis: It is definitely set forth in the answer.

The Court: I think it is covered by the pleadings. Gentlemen, that is about as definite as I think I can make it.

Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position, except this——

Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time. [fol. 270] The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill.

Mr. Jones: Yes, I am going to except to that portion of the charge.

The Court: The plaintiff excepts to the instruction. All right, gentlemen, you may retire.

(The jury then again retired to consider of its verdict.)

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The Court overruled the said motion for an instructed verdict.

The plaintiff, in open Court before the argument to the jury began, and before the main charge of the Court was delivered to the jury, presented to the Court, and asked the Court to give its special instructions number "A" as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of

speed, therefore, you will return a verdict in favor of the plaintiff for the damages he has sustained."

[fol. 271] The Court having refused to give plaintiff's said special charge Number "A" which was in effect a peremptory charge for plaintiff, the plaintiff requested the Court to give in charge to the jury special charge Number "1" which was duly presented to the Court before the argument began, and before the main charge was delivered to the jury as follows:

PLAINTIFF'S REQUESTED SPECIAL INSTRUCTIONS

Special Charge No. 1 Requested by the Plaintiff

GENTLEMEN OF THE JURY: You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car wrecked and the plaintiff was injured.

You are further instructed that it was the duty of the defendant's employee Merchant to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any, proximately resulting therefrom to the said plaintiff.

Now, if you shall believe from a preponderance of the evidence that the said Merchant negligently ran the said motor car at a righ rate of speed and that by reason thereof the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as consistent [fol. 272] with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plaintiff a car that was safe for the purposes for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purposes for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was

not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car, that it was caused to leave the track, or if you shall find that by reason of the defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff.

S. P. Jones.

The Court refused to give this charge to the Jury. To this action of the Court the plaintiff then and there in open Court excepted and still excepts, and in this behalf tenders his bill of exception.

The Court having refused plaintiff's special charge "A" and plaintiff's charge "1" hereinabove set out before the argument to the jury began, and before the main charge of the Court was delivered to the jury, the plaintiff requested the Court to give in charge to the jury his special charge No. "3," as follows:

[fol. 273] Special Charge No. 3

GENTLEMEN OF THE JURY: You are instructed that the defendant contends that the plaintiff was guilty of contributory negligence in that he commanded, directed or encouraged the man Merchant, who was operating the motor car, to operate the same at a dangerously high rate of speed which resulted in the wreck of the said car and the injury to plaintiff.

In this connection you are instructed that the burden of proof is upon the defendant to establish by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

Now, bearing in mind these instructions, you are further instructed that if the plaintiff commanded, directed or encouraged the said Merchant to operate the said car at a dangerously high rate of speed, and that the plaintiff knew, or in the exercise of ordinary care should have known that in so commanding, directing or encouraging the said Mer-

chant to operate said car at such dangerously high rate of speed, that it would probably result in the wreck of the said car, that the plaintiff would be guilty of contributory negligence and would not be permitted to recover. However, you are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right to recover, you must find that the plaintiff knew that it was dangerous to operate said car at such high rate of speed and with knowledge of such danger commanded, directed or encouraged the said Merchant to so operate the same. Again you are instructed that the plaintiff would not be guilty of contributory neg- [fol. 274] ligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with saftey and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence.

S. P. Jones, Attorneys for Plaintiff.

The Court refused to give this charge to the jury. To this action of the Court the plaintiff then and there in open Court excepted and still excepts, and in this behalf tenders his bill of exceptions.

The Court having refused to give plaintiff's special charge "A" and having refused to give plaintiff's special charges "1" and "3", before the argument to the jury

began, and before the main charge of the Court was delivered to the jury, the plaintiff requested the Court to give in charge to the jury its special instruction Number B, as follows:

[fol. 275] Special Charge No. B

Gentlemen of the Jury: In this case the proof shows that the plaintiff was a passenger on the motor car, and the proof also shows and in fact the defendant has admitted in its answer, that at the time the car was wrecked and the plaintiff received the injuries for which he sues, that the said car was being operated at a dangerously high rate of speed. There is some testimony to the effect that the car was defective. The evidence also shows that the plaintiff received severe injuries by reason of the derailment of the said car.

You are instructetd that it will be your duty to return a verdict in favor of the plaintiff in this case, for the damages sustained by him by reason of the injuries unless you shall find for the defendant under its plea or contention that the plaintiff assumed the risk of being injured, or that the plaintiff was guilty of contributory negligence proximately causing his injury.

In this connection you are instructed that on assumed risk as applicable to this case as follows:

The plaintiff assumed all the risks ordinarily incident to the operation of the motor car and the carriage of passengers thereon, and if he was injured by reason of a risk ordinarily incident to the operation of the motor car, he cannot recover. However, in this connection you are instructed that the plaintiff did not assume the risk of injuries resulting from the defective condition of the said car or the operation of the said car in a defective condition if the defendant knew of such defective condition, or in the exercise of ordinary care could have ascertained such defective condition thereof.

[fol. 276] Nor, did the plaintiff assume the risk of being injured by reason of the negligence of any of the agents, servants and employees of the defendant.

You are further instructed that inasmuch as the plaintiff was a passenger, a failure on the part of the said de-

fendant, its agents, servants and employees to exercise a high degree of care for his safety would constitute negligence upon the part of the said defendant.

Again you are instructed that the plaintiff would not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence so situated would have abandoned the car.

With reference to the defense of contributory negligence you are instructed that it was the duty of the plaintiff to exercise ordinary care, that is, such a degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances to avoid injury to himself, and failure on his part to do so would constitute contributory negligence.

Now in this connection you are instructed that the defendant contends that the said Merchant was operating the said car over its track at the time of the accident in open violation of the rules and regulations of the defendant and that the company is not responsible for the result to the plaintiff therefrom.

Again you are instructed that if the plaintiff knew that the said Merchant was in fact operating the said car over the track in violation of the rules and regulations of the said company, and if the plaintiff after obtaining such knowledge had an opportunity to abandon said car at a regular station of the said defendant, and negligently failed to do so, then the plaintiff would be guilty of contributory [fol. 277] negligence and could not recover.

However in this connection you are instructed that the plaintiff had the right to assume and to act upon the assumption that the said Merchant would not operate the said car in violation of the rules and regulations of the said company, and unless the said plaintiff knew that the said Merchant was in fact violating the rules of the said Company in operating the said car and acquiesced in and agreed thereto after an opportunity to have abandoned the said car at a station of the defendant, he cannot be held to be guilty of contributory negligence.

Again you are instructed that the burden is upon the defendant to establish contributory negligence upon the

part of the plaintiff. In this connection you are further instructed that if the said plaintiff commanded, directed or encouraged the said Merchant to operate the said car at a dangerously high rate of speed, and that the said plaintiff knew that it was dangerous for the said car to be so operated at such high rate of speed, and if by reason of such command, direction or encouragement on the part of the plaintiff the said Merchant did operate the same at a high rate of speed thereby causing the wreck and injury, then the plaintiff could not recover as he would be guilty of contributory negligence. However, you are instructed that the plaintiff would not be guilty of contributory negligence proximately causing the injury by merely encouraging the said Merchant to operate the said car at a high rate of speed unless it shall appear from the evidence that the plaintiff knew that it was dangerous for the car to be so operated at such high rate of speed.

In this connection you are instructed that the plaintiff has the right to assume that the said Merchant knew the [fol. 278] speed at which the said car could be operated with safety, but that if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate the said car at a rate of speed that was not reasonably safe, the plaintiff would be guilty of contributory negligence and could not recover.

If under the foregoing instructions you shall find in favor of the plaintiff, you will next consider the amount of damages sustained by him by reason of the injuries, and I give you the following instruction as your guide for estimating the damages sustained by the plaintiff:

If you shall find in favor of the plaintiff in this case you will assess his damage at such a sum of money as if paid now in cash will fairly compensate him for the injuries he has sustained. In arriving at the amount of damages you allow the plaintiff, if any, you are instructed that you may take into consideration such mental and physical pain and suffering as the plaintiff has endured by reason of said injuries to the date of this trial and allow him such a sum of money as if paid in cash will fairly compensate him therefor; and if you believe with reasonable certainty from a preponderance of the evidence that the plaintiff will continue to suffer mental and physi

cal pain in the future, you will allow him such a sum of money as if paid in cash now will fairly compensate him therefor. And if you shall believe from the evidence that by reason of the injury the plaintiff received that he has lost any time up to the date of this trial, you will allow him such a sum of money as if paid in cash will reasonably compensate him therefor. And if you shall believe from a preponderance of the evidence that the plaintiff's ability to earn money in the future has been decreased by reason [fol. 279] of the said injury he received, you will allow him such a sum of money as if paid now will fairly compensate him therefor; that is to say—you will allow the plaintiff, if you find in his favor, a lump sum of money which if paid in cash at this time will fairly compensate him for the loss he has sustained by reason of the said injuries as submitted to you in these written instructions.

——— ———.

The Court refused to give this charge to the jury. To this action of the Court, the plaintiff then and there in open court excepted, and still excepts, and in this behalf tenders his bill of exceptions.

Thereupon the Court charged and instructed the Jury orally as follows: ———

EXCEPTIONS TO CHARGE TO JURY

At the conclusion of the Court's verbal charge above set out, and the reading of the defendant's special charges given and embodied in the said verbal charge of the Court as transcribed by the stenographer, and before the jury had retired to consider of their verdict, the plaintiff in open Court again requested the Court to give in charge to the jury its several special instructions hereinabove set out and numbered "A," "1," "3" and "B," and upon the Court's refusal to do so again excepted to the action of the Court. Thereupon in open Court, and before the jury had retired to consider of a verdict the plaintiff had noted to the Court's main charge, and the defendant's [fol. 280] special charges given, the following exceptions to-wit:

"We except to the defendant's first special charge with reference to the definition of when Merchant would be acting in the course of his employment, for the reason that in a case of this kind, having started out in the work that was clearly within the scope of his employment, the master would continue liable to Ellzey for his misconduct until Ellzey knew that he had exceeded or passed beyond the scope of his employment."

2. We except to the second special charge of the defendant given which special charge is largely on the same point, and subject to the same exception.

3. We except to that portion of the main charge, and the special charge given at request of defendant wherein the Court instructed the jury that with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent, that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed.

4. The plaintiff excepts to the Court's charge in which the defendant's special charge No. 20 on contributory negligence is substantially given,—wherein the Court tells the jury in substance:

"I charge you, Gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand-car fast, or at an excessive rate of speed, and in [fol. 281] compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the hand-car was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the hand-car at an excessive rate of speed. In other words, if he induced or requested Merchant, Gentlemen,

to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery."

We except to that charge because it is an erroneous statement of the law of contributory negligence in this case, and places upon plaintiff an improper burden and relieves the defendant on the grounds of contributory negligence on an incorrect theory of law.

5. Plaintiff again excepts to the failure of the Court to give his special charges requested "A" "1" "3" and "4," and especially those portions thereof not embodied in the main charge of the Court.

6. The jury having retired to consider of their verdict, and thereafter before reaching a verdict returned into open Court and requested additional instructions on contributory negligence, and the Court having given such additional in-[fol. 282] structions on contributory negligence, the plaintiff reserves the following exceptions to the said additional instructions so given to the jury by the Court.

A. We except to the new definition of "contributory negligence" given at the request of the jury, because conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causes the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence would not have been guilty of under the same or similar circumstances, having the opportunity, information, etc., as the plaintiff had at the time.

B. We also except because if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence, must have been such that he knew endangered his safety; and to that extent we except to the new definition of "contributory negligence."

C. We also except because the defendant had urged no plea of an omission on the part of the plaintiff to check the speed of the car.

Qualification or Explanation by the Court of Plaintiff's Exceptions to the Supplemental Charge Given to the Jury After They Had Returned from Their Consideration of the Case for Additional Instructions.

After the Court had instructed the jury as shown by the charge copied into the bills of exceptions, the following occurred before the jury retired:

[fol. 283] Colloquy Between Court and Counsel

"Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position except this."

"Mr. Lewis: Your Honor, if Counsel is going to make an extended argument, I don't think it is proper at this time."

"The Court: Gentlemen, I have covered the points sufficiently, and whatever right may be sought in the matter can be protected by the proper bill."

"Mr. Jones: Yes, I am going to except to that portion of the charge."

"The Court: The plaintiff excepts to the instruction. All right Gentlemen, you may retire."

Thereupon the jury retired and after considering the case further returned into open Court their verdict, and thereafter on the second day the plaintiff filed his motion for a new trial in which he excepted to the said supplemental charge of the Court, and urged a new trial by reason of the error of the Court complained of in substance as follows:

D. We except to said additional instruction which tells the jury in substance that plaintiff could be guilty of contributory negligence defeating a recovery by knowledge on his part, that the car was being operated at an excessive rate of speed, or that if a person of ordinary care similarly [fol. 284] situated as plaintiff, would have known that the

car was being operated at an excessive rate of speed, and under such circumstances plaintiff acquiesced in the continued operation by failing to protest, and by failing to abandon the car at the earliest possible moment, because passive action or omission to act by a passenger can not amount to contributory negligence as the passenger entrusts his safety to the carrier nor can the passenger be guilty of contributory negligence in failing to tell the carrier how he, (the passenger) thinks the vehicle should be managed or controlled.

E. We further except to said charge because certainly the passenger could not be guilty of contributory negligence merely because some person of ordinary care and prudence similarly situated would have appreciated the danger, and would have protested, that is to say that certainly under any phase of the case, the passenger could not be guilty of contributory negligence in failing to protest or abandon the carriage unless he actually knew of the negligence, and appreciated the danger to him thereabout.

Minute Entry of Verdict

Shreveport, La., October 28, 1924.

The trial of this case was this day resumed before the same jury, the plaintiff being present and also represented [fol. 285] by his attorneys of record, and the defendant being represented by its attorneys. Plaintiff's evidence was further adduced and concluded, and the defendant's evidence was adduced and concluded, and thereupon, at the conclusion of all the evidence, the defendant filed a motion for instructed verdict in favor of defendant, which motion was overruled by the Court, and to which ruling of the Court in refusing to grant said motion the defendant reserved a bill of exceptions. Whereupon, after argument of counsel and the charge of the Court, the jury retired to consider of their verdict. The jury later returned into Court and asked for further instructions, and there being no objection, were given further instruction by the Court, and again retired to consider of their verdict, and later, again returning into Court, in the presence of plaintiff and his counsel, and the

defendant's counsel, the jury returned the following verdict:

"We the Jury bring in a verdict in favor of the defendant.

J. T. Jeter, Foreman."

"We do not give the defendant damages on account of Hospital and Doctors' bills.

J. T. Jeter, Foreman."

The Court then directed that the verdict be filed and placed of record, and that the jury be discharged from further consideration of this case.

[fol. 286] JUDGMENT—Filed March 6, 1925

This case having been tried according to law before a jury, the law and the evidence being in favor thereof and the verdict of the jury being in favor of the defendant and against the plaintiff, except that the defendant's reconventional demands were rejected;

It is, therefore, ordered, adjudged and decreed that plaintiff's demands be rejected at his costs; and

It is further ordered, adjudged and decreed that the defendant's reconventional demand against the plaintiff be rejected.

Thus done, read and signed in open Court on this the 6th day of March, A. D. 1925.

Ben C. Dawkins, Judge, United States District Court for the Western District of Louisiana.

MOTION FOR NEW TRIAL—Filed October 30, 1924

Now comes the Plaintiff and presents this his Motion for a new trial which he prays the Court to consider and grant for the following good and sufficient reasons, towit:

[fol. 287] I

The Court erred in refusing to give Plaintiff's Special Charge No. "A"—which was in effect a peremptory instruc-

tion directing the jury to return a verdict in favor of the plaintiff.

II

The Court erred in refusing to give Plaintiff's Special Charge No. 1—to the effect that if the motor car was defective and Merchant negligently ran it at a speed for which it was not suited, causing the wreck, or if the motor car was not defective and Merchant negligently ran it at a high rate of speed causing the wreck, that a verdict should be rendered for the plaintiff.

III

The Court erred in refusing Plaintiff's Special Charge No. B, with reference to contributory negligence to the effect that if Merchant was operating the car over defendant's tracks in open violation of the rules and regulations of the defendant, and if the plaintiff had actual knowledge thereof and with such knowledge had an opportunity to abandon the car at a regular station and negligently failed to do so, that he would be guilty of contributory negligence, but that the plaintiff had the right to assume and act upon the assumption that Merchant would not operate the car in violation of the rules of the Company, and unless the plaintiff in fact knew that he was violating the rules of the Company and agreed thereto after an opportunity to abandon the said car at a station of the defendant, he would not be guilty of contributory negligence, and that the burden was upon the defendant to establish contributory negligence [fol. 288] upon the part of the plaintiff.

N. B.—There was no evidence raising the issue of contributory negligence on the part of the plaintiff—in that the most that can be said of the evidence introduced—there was no serious objection by the defendant or its employee to the speed the car made, and no refusal or effort on the part of Merchant to operate the car at a lower rate of speed. There was not even a hint in the evidence of coercion on the part of Merchant by plaintiff, and it is clear that as to a passenger there could be no contributory negligence in the absence of coercion.

IV

The Court erred in the main charge in telling the jury in effect if a person of ordinary care and prudence situated as plaintiff would have known of danger of operating the car at high speed, and if under such circumstances the plaintiff encouraged or commanded the man Merchant to so operate it, he would be guilty of contributory negligence. This was error:

(a) Because there was no evidence raising the issue of plaintiff commanding a high speed in the absence of which there could be no contributory negligence, and there was no evidence of plaintiff even urging or encouraging Merchant to a high speed.

(b) A passenger could not be guilty of contributory negligence in urging or commanding Merchant (in the absence of positive coercion) to use the appliances in a particular way or manner.

(c) If the doctrine of contributory negligence could be invoked to relieve the carrier, it could only be invoked where the passenger had actual knowledge of the danger and not [fol. 289] where a person of ordinary care would have appreciated same.

There can be no constructive knowledge of danger that would raise the issue of contributory negligence on the part of the passenger.

V

The Court erred in the definition of "contributory negligence" as applicable to this case in the main charge and in the supplemental instructions given at the request of the jury, in telling the jury in substance that plaintiff could be guilty of contributory negligence defeating a recovery by knowledge on his part, or if a person of ordinary care similarly situated would have known that the car was being operated at an excessive rate of speed and under such circumstances acquiesced in the continued operation by failing to protest and by failing to abandon the car.

Passive action or omission to act by a passenger cannot amount to contributory negligence as the passenger entrusts his safety to the carrier.

VI

The Court erred in refusing to give that portion of plaintiff's Special Charge No. 3 on "contributory negligence"—to the effect that the plaintiff would be guilty of contributory negligence only by commanding and directing or encouraging Merchant to operate the car at a dangerously high rate of speed, if he knew that it was dangerous for the car to be so operated, and if Merchant did operate the car at a dangerous rate of speed and caused the wreck [fol. 290] by reason of the plaintiff's command, etc.; but that the plaintiff would not be guilty of contributory negligence by merely encouraging Merchant to operate the said car at a high rate of speed, unless plaintiff knew it was dangerous and that the plaintiff had the right to assume that Merchant knew the speed at which the car could be operated with safety.

VII

The Court erred in permitting the witnesses —— Adams and —— Merchant to testify over plaintiff's objections and exceptions to the effect that plaintiff said at the station of Carstens, where the telegraph line was repaired, "that if the car stayed on the track they would have some more wild running,"—which at most was in response to a suggestion that they not try to go to Leesville.

This was error because it did not prove or tend to prove any substantial issue in the case, and did not show or tend to show that Merchant was acting under coercion as the said Merchant was under no obligation to comply with the plaintiff's suggestions.

VIII

The verdict is contrary to and unsupported by the evidence and is against the undisputed testimony.

IX

The verdict is against the great preponderance of the evidence and is an unconscionable verdict under the undisputed evidence in this case.

[fol. 291] Wherefore the plaintiff prays that this his motion for a new trial be considered and granted.

Jones, Sexton, Jones & Buck, Bullock & Warren,
Attorneys for Plaintiff.

AMENDED MOTION FOR NEW TRIAL—Filed December 12, 1924

Now comes the plaintiff and amends his motion for a new trial in this cause adding thereto sections or subdivisions X, XI, XII, XIII, XIV, as follows:

X

There was not sufficient evidence to raise the issue of Ellzey having forced Merchant to operate the car at a dangerous rate of speed, or of Ellzey knowing that the speed was dangerous.

XI

Because the Court erred in the Supplemental Charge to the Jury, and especially in that portion thereof in which the Jury was instructed that the plaintiff would be guilty of passive contributory negligence if a reasonable man acting in the circumstances in which he was situated must reasonably have known that it would contribute to the accident.

[fol. 292]

XII

If the plaintiff could be guilty of passive contributory negligence, it could not be measured by what an ordinary man in his situation would have known, but whether he knew or a man of his information and experience would have known of the danger, and would have interposed his judgment against that of the operator of the car.

XIII

The Court erred in that portion of the Supplemental Charge in saying in substance that if a person in plaintiff's situation must reasonably have known that the speed was

dangerous, and continued without protest, and without removing himself from the car at the "earliest possible moment" he would be guilty of contributory negligence. Whereas, if any such charge was applicable, it should have instructed the Jury that if a person of ordinary care with plaintiff's information and experience, would have abandoned the car, then his failure to do so would constitute contributory negligence.

XIV

The Court erred in refusing to give that portion of Plaintiff's Special Charge No. 3 to the effect that the mere encouragement of Merchant to operate the car at a high rate of speed would not constitute contributory negligence, but it would be necessary for the plaintiff to know that it was dangerous to operate the car at such speed, also that it would be necessary for the Jury to find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented him from operating [fol. 293] the car at such speed. Said portion of said Charge being as follows:

"However, you are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence, but the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car at such high rate of speed and with knowledge of such danger commanded, directed or encouraged the said Merchant to so operate the same. Again you are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment

against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence."

Wherefore, the plaintiff prays that his motion for a new trial and Amended Motion for a new trial be considered, [fol. 294] and that same be granted, and that the verdict be set aside, and a new trial given him.

Jones, Sexton, Jones & Buck, Bullock & Warren, Attorneys for Plaintiff.

ORDER OVERRULING MOTION FOR NEW TRIAL

Shreveport, La., March 6, 1925.

For reasons orally assigned,

It was ordered that the motion for new trial herein be overruled, and on consideration of the motion of the defendant the following order extending time to April 15th in which to prepare and present bills of exception was signed and filed and is now recorded.

ORDER EXTENDING TIME

The foreging application being presented and considered, and it appearing that orders have heretofore been entered, extending the time, and that motion for new trial was presented and filed — the term of the Court at which the cause was tried, and such motion continued over to the present term of Court, the application is allowed, and the time within which bills of exceptions may be prepared, allowed and filed in said cause is extended to the 15th day of April, 1925, and the said cause is by this order kept open for such purpose.

[fol. 295] Signed in term time at Shreveport, Louisiana, this the 6th day of March, 1925.

Ben C. Dawkins, Judge.

Whereupon, on motion of counsel for defendant, judgment was signed and filed and recorded. (See judgment Record, Volume 9, Folio 268.)

Petition and Order Extending Time—Filed March 6, 1925

In the United States District Court for the Western District of Louisiana. Shreveport Division

(Title omitted.)

Now comes the plaintiff, R. E. Elzey, and shows that orders have heretofore been made extending the time within which Bills of Exception can be allowed and filed and that motion for new trial was duly presented at the term of Court at which this case was tried and was filed and continued by order of Court to the present term of said Court, and he now asks that this Court extend the time within which bills of exceptions may be allowed and filed to the 15th day of April, 1925, and that the cause be kept open for such purpose.

Bullock & Warren, Attorneys for Plaintiff.

Order extending time for filing Bill of Exceptions omitted, being heretofore copied at page 294.

* * * * * * *

[fol. 296] And now, in furtherance of justice, and in accordance with the order of the Court quoted above, extending and enlarging the time within which to prepare and present his bill of exceptions in this case, which bill of exception has been submitted to the defendant, the plaintiff, R. E. Ellzey, now presents same and prays that same may be settled, allowed, filed and sealed by the Court, and made a part of the record in this case.

S. P. Jones, O. W. Bullock, Attorneys for Plaintiff.

Bills of Exceptions submitted to opposing counsel in presence of Court this April 10th, 1925, who declined to sign same but urged no specific objection thereto.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

Approved and ordered filed this 11th day of April, 1925

Ben C. Dawkins, Judge.

[fol. 297] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed April 11, 1925

To the Honorable Ben C. Dawkins, Judge of the District Court aforesaid:

Now comes R. E. Ellzey by his Attorneys, and respectfully shows that on the 28 day of October, 1924, a jury duly impaneled found a verdict against your petitioner, and in favor of the defendant herein, and upon said verdict a final judgment was entered against your said petitioner.

That thereafter by orders duly entered the said cause was kept open and jurisdiction thereof retained by the said District Court of the United States by orders duly made and entered, and that a motion for a new trial was duly prepared and presented, and the said Honorable Court directed the same to be filed and continued for further argument and that thereafter on the 6th day of March, 1925, the said motion for new trial was overruled, and that on the said 6th day of March, 1925, a final judgment was entered and against your petitioner that he take nothing in the said cause, and rejecting his demands, and that the defendant, The Kansas City Southern Railway Company go hence without day.

Your petitioner, feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing him to prose-

cute a writ of error to the Circuit Court of Appeals of the [fol. 298] United States for the Fifth Circuit, under the laws of the United States in such cases made and provided, in accordance with the assignment of error annexed hereto.

Therefore, the premises considered, your petitioner prays that a writ of error do issue in this behalf of the United States Circuit Court of Appeals aforesaid, sitting at New Orleans in said Circuit, for the correction of the errors complained of and herewith assigned, and that an order be made fixing the amount of security to be given by the Plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

S. P. Jones, O. W. Bullock, Attorneys for Plaintiff in Error.

In United States District Court

Assignments of Error—Filed April 11, 1925

Now comes R. E. Ellzey, Plaintiff in error in the above numbered and entitled cause, and, in connection with his petition for a writ of error in this cause, assigns the following errors which the plaintiff in error avers occurred [fol. 299] on the trial hereof, and upon which he relies to revise the judgment entered herein, as appears of record:

First Assignment of Error

The Court erred in refusing to give to the jury the special instruction No. "A" requested by the plaintiff, which was in effect a peremptory instruction, and as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car, and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of speed, therefore, you will return a verdict in favor of the plaintiff for the damages he has sustained."

Second Assignment of Error

The Court erred in refusing to give a peremptory charge in favor of the plaintiff in that the defendant requested the Court by written motion filed to instruct a verdict for the defendant, and the plaintiff by his special charge "A" requested the Court to direct a verdict for the plaintiff, and there being no sufficient evidence to raise the issue of a defense in said cause, but under the uncontroverted evidence the plaintiff being entitled to recover the damages sustained by reason of the injuries he received, the Court erred in submitting the said cause to the jury on issues of negligence, and in failing and refusing to decide the said cause and render judgment on the issues of negligence in favor of the plaintiff.

[fol. 300] Third Assignment of Error

The plaintiff and the defendant having each by their written request asked the Court to direct a verdict in this cause on the question of liability, the Court erred in failing to do so, and in submitting the said cause to the jury on the question or issue of liability, but should have so decided the said cause in accordance with the said request of the said parties plaintiff and defendant.

Fourth Assignment of Error

The Court erred in refusing to direct a verdict in favor of the plaintiff as to liability because the uncontroverted evidence showed that the plaintiff was injured by reason of the negligence of the defendant and under such circumstances as that the defendant was liable to him for the damages he sustained, and that he had sustained damages in a very large amount, and the defendant offered no evidence whatever that would justify the Court in submitting to the jury the question of the defendant's liability to the plaintiff.

Fifth Assignment of Error

The Court erred after declining to give the plaintiff's peremptory instruction "A" in refusing to give to the jury the said Instruction No. 1 requested by the plaintiff as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car — wrecked and the plaintiff was injured.

[fol. 301] You are further instructed that it was the duty of the defendant's employee Merchant to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any proximately resulting therefrom to the said plaintiff.

Now, if you shall believe from a preponderance of the evidence that the said Merchant negligently ran the said motor car at a high rate of speed and that by reason thereof the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as — consistent with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plaintiff a car that was safe for the purposes for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purposes for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff."

[fol. 302] Sixth Assignment of Error

The Court erred after refusing to give the plaintiff's peremptory special charge "A," and plaintiff special charge No. 1 requested in refusing to give to the jury the special instruction No. "3" requested by the plaintiff as follows:

"You are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car at such high rate of speed and with knowledge of such danger commanded, directed or encouraged the said Merchant to so operate the same."

Seventh Assignment of Error

The Court erred, after refusing to give the peremptory instruction "A," and plaintiff's special charge 1, requested by the plaintiff, in refusing to give to the jury the special instruction No. 3 requested by the plaintiff, in the following language:

"You are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interferred and prevented the said Merchant from operation [fol. 303] [operating] the car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence."

Eighth Assignment of Error

The Court erred, after declining to give plaintiff's peremptory instruction "A," and Plff's special charge 1 and 3 above referred to, in refusing to give to the jury the

special instruction No. B requested by the plaintiff, which is as follows:

"Again you are instructed that if the plaintiff knew that the said Merchant was in fact operating the said car over the track in violation of the rules and regulations of the said company, and if the plaintiff after obtaining such knowledge had an opportunity to abandon said car at a regular station of the said defendant, and negligently failed to do so, then the plaintiff would be guilty of contributory negligence, and could not recover. However in this connection you are instructed that the plaintiff had the right to assume and to act upon the assumption that the said Merchant would not operate the said car in violation of the rules and regulations of the said company and unless the said plaintiff knew that the said Merchant was in fact violating the rules of the said company in operating the said car and acquiesced in [fol. 304] and agreed thereto after an opportunity to have abandoned the said car at a station of the defendant, he cannot be held to be guilty of contributory negligence."

Ninth Assignment of Error

The Court erred after declining to give plaintiff's peremptory instruction "A," and Plff's special charges 1 and 3 above referred to, in refusing to give to the jury the special instruction No. B requested by the plaintiff, which is as follows:

"You are instructed that the plaintiff would not be guilty of contributory negligence proximately causing the injury by merely encouraging the said Merchant to operate the said car at a high rate of speed unless it shall appear from the evidence that the plaintiff knew that it was dangerous for the car to be so operated at such high rate of speed. In this connection you are instructed that the plaintiff had the right to assume that the said Merchant knew the speed at which the said car could be operated with safety, but that if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate the said car at a rate of speed that was not reasonably safe, the plaintiff would be guilty of contributory negligence and could not recover."

Tenth Assignment of Error

The Court erred in that portion of the charge to the jury which is as follows; which was given at the request of the defendant as its special instruction No. 1:

"I charge you, Gentlemen of the Jury, that while as a general rule the master is liable for the negligence of the [fol. 305] servant, it must appear that such fault or negligence on the part of the servant was committed in the course of his employment and the master is not liable for a fault or negligence of the servant committed by him while not prosecuting the work of the master. That is, where he ceased to perform the duty for which he was employed and puts off on some other expedition or uses tools which are put in his hands for his own benefit, and not for the purpose of the business of the company; then he ceases to be an employee of the company, and the company is not responsible for his damage. Therefore, if you find that Merchant, the employee of the Kansas City Southern Railway Company was not acting within the scope of his employment at the time of the accident to the plaintiff, it is immaterial whether Merchant was negligent or not, because the plaintiff cannot recover against the defendant unless Merchant was acting within the scope of his employment at the time of the negligence charged to have been committed."

Note.—Plaintiff reserves an exception to this charge.

Eleventh Assignment of Error

The Court erred in that portion of the charge to the Jury which is as follows, and was given as a part of defendant's special charge No. "2":

"I charge you that it is not enough for you to find that Merchant was an employee of the defendant railway company in order to hold it liable for the accident of which the plaintiff complains. In order to recover for the consequences of this accident, the plaintiff must show, and you must find by a preponderance of the evidence, that the negligence of Merchant occurred while he was doing some act [fol. 306] necessary in the discharge of his duties towards the defendant. If you find that the act that he was doing

at the time of the accident was not necessary for the discharge of his duties to the railway company, then I charge you that he had ceased to be within the scope of his employment, and for his acts during such time the defendant is not liable. In other words, what I have said before is that the question is to be determined reasonably by what he was doing at the time."

Twelfth Assignment of Error

The Court erred in that portion of the charge to the jury which is as follows:

"I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

Thirteenth Assignment of Error

The Court erred in refusing to give plaintiff's special charge "A" which was in effect a peremptory charge to find for the plaintiff on the question of liability, because the uncontroverted evidence in the case showed that the said Merchant was acting for the defendant, and within the scope of his employment when the plaintiff was in-[fol. 307] jured, and the uncontroverted evidence, as well as the admissions of the defendant made in its answer filed in said cause, showed that the said injury to the plaintiff was caused by the said Merchant operating the said car at an excessive and dangerously high rate of speed which constituted negligence.

Fourteenth Assignment of Error

The Court erred in that portion of the charge to the jury which is as follows, and is referred to in said charge copied herein as defendant's special charge No. 20:

"I charge you, Gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand-car fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the hand-car was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the hand-car at an excessive rate of speed. In other words, if he induced or requested Merchant, Gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery."

[fol. 308] Fifteenth Assignment of Error

The Court erred in that portion of the charge to the jury which was given after the jury had retired to consider their verdict, and had returned into open Court, and asked for additional instruction, and which is as follows:

"If, in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agent, who, though found from the evidence, were acting within the scope of the employment, but notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery."

Sixteenth Assignment of Error

The Court erred in that portion of the additional charge given after the jury had returned into open Court, and asked for additional instruction as follows:

"If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have [fol. 309] known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence."

Wherefore plaintiff in error prays that the judgment herein be reversed, and the said cause remanded with such directions given as will insure to the plaintiff the full force and efficacy of the rights he is entitled to by reason of the facts in the case, the law applicable thereto, and the claims he has urged.

S. P. Jones, O. W. Bullock, Attorneys for Plaintiff in Error.

In United States District Court

Order Granting Writ of Error—Filed April 11, 1925

On this the 11th day of April, 1925, came, R. E. Ellzey, plaintiff in the above styled and numbered suit by his attorneys, and presented a petition for an order allowing him to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Fifth Circuit for the cor- [fol. 310] rection of errors in the judgment entered against him in this cause on the 6th day of March, 1925, and overruling his petition for a new trial, under and according to

the laws of the United States in their behalf made and provided, and also praying that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error; and, it appearing to the Court that the said plaintiff has duly filed in said cause Assignments of Error, and prayer for the reversal of the judgment rendered and entered herein against him in said cause, upon due consideration of the same, it is here and now ordered that said petition of the said plaintiff be, and the same hereby is, granted, and that the writ of error prayed for be, and the same hereby is allowed to review, in the United States Circuit Court of Appeals for the Fifth Circuit, the Judgment so rendered and entered against the plaintiff in said cause, and it is further ordered that upon the plaintiff, R. E. Ellzey filing with the Clerk of the United States District Court for the Western District of Louisiana, at Shreveport, Louisiana, a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars payable to the defendant herein, conditioned that if the plaintiff, R. E. Ellzey, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the said obligations to be void,—otherwise to remain in full force and virtue. The said bond be approved by the Judge, all further proceedings in the United States District Court for the Western District of Louisiana shall be, and hereby are, suspended, until the determination of the writ of error by the said United States Circuit Court of Appeals for the Fifth Circuit.

[fols. 311 & 312] Made this the 11th day of April, 1925.

Ben C. Dawkins, Judge of the United States District Court for the Western District of Louisiana.

Bond on writ of error for $500.00, approved and filed April 11, 1925, omitted in printing.

[fol. 313] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 11, 1925

To the Clerk of said Court:

We beg to request you to make up a transcript of the record in the above case to include the following:

1. Caption.
2. Plaintiff's Petitions, Original Amendment, etc.
3. Citation or process showing return thereon.
4. Defendant's Answer and Amendments, if any.
4½. Jury impaneled.
5. Evidence.
6. Defendant's Motion for verdict.
7. Plaintiff's Peremptory Charge "A" and other Special Charges and Exceptions thereto.
8. Court's charge.
9. Plaintiff's exceptions to Court's Charge.
10. Verdict.
11. Judgment.

[fol. 314] 12. Motions for new trial, and Amendments thereto.

13. Order overruling motion for new trial, and judgment thereon.

14. The order extending time to perfect record to April 15th.

15. Order approving Bill of Exceptions.
16. Petition for Writ of Error.
17. Assignments of Error.
18. Order granting Writ.
19. Bond for writ of Error.
20. Writ of Error.
21. Citation in Error.
22. Clerk's Certificate.

Respectfully, S. P. Jones, O. W. Bullock, Attorneys for Plaintiff.

[fol. 315] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 316] Minute entry of argument and submission March 9, 1926, omitted in printing.

In United States Circuit Court of Appeals for the Fifth Circuit

No. 4555

R. E. Ellzey, Plaintiff in Error,

versus

Kansas City Southern Railway Company, Defendant in Error

Opinion—Filed March 24th, 1926

Otis W. Bullock and S. P. Jones for plaintiff in error.

J. D. Wilkinson and C. H. Lewis (J. D. Wilkinson, C. Huffman Lewis, W. Scott Wilkinson, and Wilkinson, Lewis [fol. 317] & Wilkinson on the brief) for defendant in error.

Before Walker, Bryan, and Foster, Circuit Judges

Walker, Circuit Judge:

This was an action by the plaintiff in error, R. E. Ellzey, against the defendant in error, Kansas City Southern Railway Company, to recover damages for personal injuries, and resulted in a judgment in favor of the latter. The parties are herein referred to by their designations in the Trial Court. At the time the plaintiff was injured he was acting as a United States Deputy Marshal, and, pursuant to orders of the Attorney General, was engaged as a guard to protect employees of the defendant during the general strike of Railway Shopmen in the summer of 1922. While so engaged at Leesville, Louisiana, a station on defendant's line of railway, he was assigned to guard T. M. Merchant, a telegraph lineman employed by defendant, who was ordered to locate and repair trouble in the telegraph line south of Leesville and north of De Quincy. Merchant and the plaintiff went by train from Leesville to De Quincy. During that trip Merchant did not locate the trouble in the line.

At De Quincy Merchant procured a railway motor car on which he, accompanied by plaintiff, went north, and located the trouble at a point south of De Ridder. After Merchant had made the required repairs, he and the plaintiff proceeded north on the motor car and, after passing De Ridder, the motor car left the track, with the result that plaintiff was injured. One of the grounds of negligence relied on by the plaintiff was that the derailment was caused by Merchant negligently operating the motor car at a dangerously high rate of speed. One of the grounds of defense set up was that plaintiff proximately contributed to his [fol. 318] own injury in that he assumed the control and direction of the motor car and influenced and induced Merchant to operate it at an excessive and dangerous rate of speed. The plaintiff complains of the refusal of the Court to instruct the jury to find in his favor and of instructions given by the Court to the jury, including the following:

"If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence."

There was evidence to the following effect: Merchant and the plaintiff stopped at Carson, a small station about six miles south of De Ridder. At that place, upon Merchant saying that he "had about enough of that wild riding," plaintiff said: "We will have some more of it if the damned thing stay*ed* on the rail." Merchant then stated he would prefer to leave the motor car at De Ridder, as they didn't have time to go farther ahead of No. 2, a passenger train going north, which plaintiff expected to take for Shreve-

port. Thereupon plaintiff insisted on going on the motor car to Leesville, which is north of De Ridder, saying they [fol. 319] would make it if the damned thing would stay on the track. Plaintiff told Merchant to go on to Leesville. After some delay at De Ridder plaintiff said to Merchant: "We sure enough will have to run now." When the derailment occurred the motor car was being operated by Merchant at a dangerously high rate of speed. There was evidence in conflict with that just summarized.

There was evidence furnishing support for a finding that the peril which resulted in plaintiff's injury would not have been incurred but for his own conduct. In his behalf it was contended that he, being a passenger on defendant's car, was not chargeable with contributory negligence barring his right to recover though Merchant's operation of the motor car at an excessive and dangerous rate of speed was brought about by the urging or insistence of plaintiff, who willingly incurred the known risk which resulted in the injury complained of. That contention is not sustainable. "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it." Little v. Hackett, 116 U. S. 366. In that case it was decided that the hirer of a public hack who gave the driver directions as to the place to which he wished to be conveyed, but exercised no other control over the conduct of the driver, was not chargeable with the driver's negligence in the operation of the conveyance. It was recognized in the opinion in that case that such a hirer might become responsible for the driver's negligence, as by taking actual control of the operation of the vehicle and procuring obedience to his orders or directions as to the manner of driving it. [fol. 320] Though Merchant was not legally bound to comply with plaintiff's orders or directions as to the operation of the motor car, yet if he submitted to plaintiff's control in the matters of the place to which they would go on the car and the speed of its movement, the plaintiff properly may be regarded as directly contributing to the injury resulting from Merchant's compliance with his demands or

directions. The plaintiff's relation to the motor car and its operator was not that of an ordinary passenger. He was a public official performing a duty to which he was assigned. That circumstance was proper to be considered in determining whether plaintiff did, or did not, have such control as resulted in his conduct being a direct and efficient cause of the peril which resulted in his injury. Under the evidence adduced it was a question for the jury whether the plaintiff did or did not directly contribute to the injury complained of. It follows that the Court did not err in refusing to direct a verdict in his favor.

Under the above set out instruction to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care situated as he was would have realized that it was dangerous to remain on the car. Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury, and plaintiff's negligence be deemed a remote cause. Chunn v. City & Suburban Railway, 207 U. S. 302; 10 Corpus Juris, 1107. The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate [fol. 321] cause of it. The instruction in question was erroneous. Because of that error the judgment is reversed, and the cause is remanded for a new trial.

Reversed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—March 24, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

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"Last clear chance"

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court for a new trial;

It is further ordered and adjudged that the defendant in error, Kansas City Southern Railway Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 322] In United States Circuit Court of Appeals

[Title omitted]

Motion for Additional Time—Filed March 30, 1926

Feeling itself aggrieved by the judgment rendered by this Honorable Court in the above matter, the defendant in error, the Kansas City Southern Railway Company, hereby gives notice of its intention to apply for a re-hearing in said cause, and in as much as under the rules of the Court it only has twenty (20) days from the date of the rendition of said judgment, that is to say from March 24, 1926, in which to file said application for rehearing and argument in support thereof, and in as much as said time is insufficient for it to properly prepare and present its said motion and argument, it respectfully prays that the Court grant to it an additional ten (10) days, that is to say thirty days from March 24, 1926, in which to prepare and file its motion for a new trial or rehearing in said case, and for which it shall ever pray.

(Signed) J. D. Wilkinson, W. Scott Wilkinson, C. Huffman Lewis, Attorneys.

[fol. 323] I hereby certify that the above motion is filed in good faith and not for mere purpose of delay.

(Signed) J. D. Wilkinson, of Counsel.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER EXTENDING TIME—March 30, 1926

On consideration of the motion of counsel for the defendant in error, it is ordered that the time within which to file a petition for rehearing on behalf of the defendant in error be extended until April 24th, 1926.

[fols. 324-327] Petition for rehearing, covering four pages, filed April 3, 1926, omitted from this print. It was denied and nothing more by order April 20, 1926.

[fols. 328-330] Supplemental petition for rehearing, covering three pages, filed April 14, 1926, omitted from this print. It was denied and nothing more by order April 20, 1926.

[fol. 331] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 20, 1926

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR AND ORDER STAYING MANDATE—Filed April 26,

In the above matter, now comes the defendant in error and shows unto the Court:

That it desires to make application to the Honorable Supreme Court of the United States for a writ of cer-

tiorari and review of the decision rendered in this case and in as much as the preparation of said application and the presentation of the same will require some time and in as much as in the meantime the mandate from this Court should be stayed,

[fol. 332] It prays that the mandate in this case be stayed and not forwarded to the Lower Court for execution for a period of Sixty (60) days and for general relief.

(Signed) Wilkinson, Lewis & Wilkinson, Attorneys.

Order

Considering the foregoing petition, it is ordered that the mandate of this Court be, and it is hereby withheld for a period of 30 days from the date of this order,—to be issued at the expiration of that time unless the application of the defendant in error for a writ of certiorari shall then have been submitted to the U. S. Supreme Court.

April 26, 1926.

(Signed) Rugus E. Foster, U. S. Circuit Judge.

[fol. 333] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 334] In Supreme Court of the United States

Order Allowing Certiorari—Filed June 7, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner.

versus

R. E. ELLZEY,
Respondent.

Petition for Writ of Certiorari to the Honorable Supreme Court of the United States.

Your petitioner, The Kansas City Southern Railway Company, respectfully petitions this court to grant a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and to remove therefrom to this court for review the record in the case there lately pending entitled R. E. Ellzey, plaintiff in error, vs. The Kansas City Southern Railway Company, defendant in error, being case No. 4555 on the docket of that court. A certified copy of the record therein is presented herewith.

Respondent R. E. Ellzey seeks in this action to recover damages against your petitioner in the sum of $60,000.00.

This action originated in the District Court of the United

States for the Western District of Louisiana, the jurisdiction of said court being based on a diversity of citizenship and not on the statutes of the United States awarding compensation to employes of interstate carriers. The trial of the cause resulted in a verdict for the defendant, on which judgment was entered on the 6th day of March, 1925. The case was taken by writ of error to the Circuit Court of Appeals for the Fifth Circuit, which court on the 24th day of March, 1926, reversed this judgment in favor of the defendant and remanded the record to the court below, with instructions to retry said case in accordance with the views therein expressed. On the 3rd day of April, 1926, your petitioner applied for a re-hearing or a new trial in said case, which application for a rehearing was refused by said Circuit Court of Appeals on April 20. 1926, and thereupon your petitioner requested that said mandate be stayed until it could apply for this writ of certiorari.

Your petitioner respectfully says that said Court of Appeals was in error in ordering judgment to be entered in favor of the respondent herein, and in reversing the judgment appealed from and in not affirming said judgment of the District Court of the United States for the Western District of Louisiana.

STATEMENT OF FACTS.

The facts from which arise the questions here presented are, briefly, as follows:

At the time the said R. E. Ellzey was injured, he was acting as a United States deputy marshall and was engaged as a guard to protect employes of the Railway Company during the general strike of railway shopmen in the summer of 1922. While so engaged, at Leesville, Louisiana, a station on the line of The Kansas City Southern Railway Company, he was assigned to guard a telegraph lineman employed by said railway company, who was ordered to locate and repair trouble in the telegraph line of said railway company south of Leesville and north of DeQuincy. At DeQuincy, Louisiana, said lineman and said R. E. Ellzey procured a railway motor car and proceeded north on the line of said railway and located the trouble at a point south of DeRidder, Louisiana. After the lineman had made the required repairs, he and the plaintiff proceeded north in the motor car, and after passing DeRidder the motor car left the track with the result that plaintiff was injured.

One of the grounds of negligence relied on by the said R. E. Ellzey in his said suit, was that the derailment was

caused by the lineman's negligently operating the motor car at a dangerously high rate of speed. One of the grounds of defense set up was that said R. E. Ellzey approximately contributed to his own injury in that he assumed the control and direction of the motor car and induced the lineman to operate it at an excessive and dangerous rate of speed. The District Court instructed the jury on the issues of negligence and contributory negligence, and, so this petitioner respectfully states, such instructions were full and correct. The said Circuit Court of Appeals ruled that the District Court had erred in instructing the jury on the issue of contributory negligence, that portion of the instruction upon which the ruling of the said Circuit Court of Appeals was based being as follows:

> "If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time, a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without

protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury and would in law constitute contributory negligence."

The reason given by the said Circuit Court of Appeals for such ruling was as follows:

"Under the above set out instruction to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care situated as he was would have realized that it was dangerous to remain on the car. Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause to the injury, and plaintiff's negligence be deemed a remote cause. Chunn vs. City & Suburban Railway, 207 U. S. 302; 10 Corpus Juris, 1107. The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it. The instruction in question was erroneous. Because of that error the judgment is reversed, and the cause is remanded for a new trial."

Your petitioner says that the District Court had fully and accurately instructed the jury on the issues of con-

tributory negligence and proximate cause as shown by the following parts of the charge of the Court. In its principal charge, the Court instructed the jury as follows:

> "It does not seem to be disputed much on one side or the other that the car was being operated at a very high rate of speed. That, I take it, is virtually admitted on both sides; but the question is, who is responsible for it? If the defendant's agent was responsible for it; if he had control of that car, and if the plaintiff in no wise urged or contributed to the fast running of that car, then the plaintiff would be entitled to recover, but if the plaintiff did urge the operation of that car at a fast rate of speed, or if he contributed to it in any way; or if, after seeing the danger, or knowing that the car was being operated at an excessive, wild rate of speed, he had reason to believe that an accident would happen and that he would be injured thereby, it was his duty at the first opportunity available to him, to refuse to continue in such dangerous situation, and thereby avoid the danger to himself. * * * * (pp. 247, 248 Transcript of Record in said Court of Appeals).
>
> "Again, you are instructed that the burden is upon the defendant to establish contributory negligence upon the part of the plaintiff. In other words, gentlemen, primarily, it is the duty of the plaintiff to prove negligence on the part of the defendant, but when the plaintiff has made his case, then the burden is shifted to the defendant to meet the case made by the plaintiff, and in

doing so, is entitled to urge what is termed contributory negligence—that is, that the plaintiff, notwithstanding the defendant's negligence, was guilty of carelessness himself, **which contributed directly or approximately to the injury.** That is what is meant by contributory negligence."

"In this connection you are further instructed that if the said plaintiff commanded, directed or encouraged the said Merchant to operate the said car at a dangerously high rate of speed, and that the said plaintiff knew that it was dangerous for the said car to be so operated at such high rate of speed, and if by reason of such command, direction or encouragement on the part of the plaintiff the said Merchant did operate the same at a high rate of speed, thereby causing the wreck and injury, then the plaintiff could not recover, as he would be guilty of contributory negligence.

"However, you are instructed that the plaintiff would not be guilty of contributory negligence **approximately causing the injury** by merely encouraging the said Merchant to operate the said car—I will have to elimniate that, Mr. Jones. That is getting too close upon my deciding the facts give that part of it. I think I have substantially covered the matter otherwise. In other words, gentlemen, the idea which counsel wishes to convey there, and on which I agree with him in principle, is that if the plaintiff should suggest that the car be operated at a faster rate than that at which it was being operated, which within itself did not constitute apparent negligence, then

the fact that he urged the faster speed, would not be negligence.

"In other words, he would have to encourage such rate of speed which within itself, to an ordinary, reasonable man who had knowledge that the plaintiff had in this case, of the conditions which the evidence shows that he had, that it would be dangerous to so operate the car. In other words, he must simply exercise reasonable common sense, and if he knowingly encouraged a high rate of speed, he should be bound to expect the consequence which would flow from the negligence in operating the car, but he would not be held to such condition, if the extent to which he urged the faster rate of speed did not reasonably, to a man in his situation, indicate that it would be dangerous.

"In this connection, you are instructed that the plaintiff has the right to assume that the said Merchant knew the speed at which the said car could be operated safely, but if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate said car at such rate of speed that was not reasonably safe, plaintiff would be guilty of contributory negligence, and could not recover." (Pp. 250-252 Transcript of Record in said Court of Appeals.)

To the instructions of contributory negligence counsel for respondent made the following objections and the District Court made the following rulings, and further instructed the jury on the issue of contributory negligence:

"Mr. Jones: The fourth and fifth: The mere supposed passenger riding in dangerous places, which we don't think is material here, because the proof shows that he was a passenger on this car. I had a memorandum here with reference to common dangers from the interruption of contributory negligence, but I think that any criticism I would have on that is cured by other portions of Your Honor's charge. I think you made it very clear as a whole, but I think that in the special charge you instructed the jury that, with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed.

"The Court: I think I explained that point very fully.

"Mr. Lewis: Your Honor please, we requested that charge No. 20, which would cover the question of contributory negligence, in the event they should find that Merchant was acting within the scope of his employment in making the trip to Leesville.

"The Court: Well, I think that has already been substantially covered, but I don't see any objec-

tion to it. I charge you, gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the handcar fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the handcar was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the handcar at an excessive rate of speed. In other words, if he induced or requested Merchant, gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery.

"Mr. Jones: We understand your Honor's position, but we merely reserve an exception to that question, as a matter of law." (Pp. 261-262 Transcript of Record in said Court of Appeals.)

The jury then retired to consider of its verdict and later returning into open Court, the respondent and his counsel and your petitioners' counsel being present, the

jury asked for further instructions, and the following occurred:

"Foreman of Jury: We want to know what would constitute 'contributory negligence' on the part of the plaintiff.

"The Court: Well, I don't suppose that there is any objection by either side to further elucidating the question of law. Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that **contributes approximately to the injury.** In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself **which reasonably contributes to the injury, approximately,** then that is what is known as 'contributory negligence.' For instance, if a man—a railroad train was being operated without a proper lookout at a crossing, and a person with no regard for his own safety, carelessly walked upon the track in the face of an approaching train, and was struck, that would be, in law, contributory negligence; or in any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. In other words, if in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agents, who, though found from the evidence, were acting within the scope of the employment but notwithstanding such

> negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery. The burden of proving contributory negligence rests upon the defendant. It is a special defense specially pleaded, and must be supported by the evidence, by a fair preponderance just as the plaintiff must support the charges of negligence on the part of the defendant by a fair preponderance of evidence. (Our italics throughout.)
>
> "I believe that substantially covers the point upon which you desired instructions." (Pp. 265, 266 Transcript of Record in said Court of Appeals.)

Respondent's counsel made the following exception to the last foregoing instruction on contributory negligence, and the Court made the following objection, and there followed the following colloquy in reference thereto:

> "Mr. Jones: With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the

time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that Your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient.

"The Court: To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued; or he must have omitted to do something which a reasonable man under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw

that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence. I think that covers it.

"Mr. Jones: There is no plea of an omission to check the speed of the car, if Your Honor please.

"Mr. Lewis: There is, Your Honor.

"Mr. Jones: Is there?

"Mr. Lewis: It is definitely set forth in the answer.

"The Court: I think it is covered by the pleadings. Gentlemen, that is about as definite as I think I can make it.

"Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered the plaintiff's position, except this:—

"Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

"The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be

sought in the matter can be protected by the proper bill.

"Mr. Jones: Yes, I am going to except to that portion of the charge." (Pp. 267-270, Transcript of Record in said Court of Appeals.)

Respondent's Sixteenth Assignment of Error is as follows:

"The Court erred in that portion of the additional charge given after the jury had returned into open Court, and asked for additional instruction as follows:

" 'If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." (Pp. 308. 309 Transcript of Record in said Court of Appeals.)

Your petitioner further says that on application for rehearing, your petitioner pointed out to the Court of Appeals that the charge of the District Court, read as a whole, answered the objections made by the Court of Appeals to that part of the instruction which it ruled to be erroneous, but notwithstanding all of which said petition for rehearing or new trial was refused.

Errors in the Circuit Court of Appeals.

Your petitioner respectfully states that the judgment and decision of the United States Circuit Court of Appeals, Fifth Circuit, upon the questions involved hereinbefore referred to are erroneous and in conflict with the decisions of this Court and with decisions of other United States Circuit Courts of Appeal, in the following particulars, to-wit:

1. The ruling of said Court of Appeals injected an issue in said case not raised in the trial court, nor assigned as an error in said Circuit Court of Appeals (McDermott vs. Severe, 202 U. S. 600; Gila Valley etc. Co. vs. Lyon, 203 U. S. 465).

2. On a general exception to a portion of the charge to the jury of the trial court, after finding such general charge correct, the said Court of Appeals erroneously, so

we respectfully contend, found error therein because such general charge was not modified or explained, although no request for any modification thereof was made. (Cooper vs. Schlesinger, 111 U. S. 148; Holder vs. United States, 150 U. S. 91; Newport News vs. Pace, 158 U. S. 36; Norfolk Ry. Co. vs. Earnest, 229 U. S. 114; Guerini Stone Co. vs. Carlin Construction Co., 248 U. S. 334; Bassell vs. Hines, 269 Fed. 231; Hall vs. Wear, 92 U. S. 728; Texas etc. Co. vs. Volk, 151 U. S. 73; Texas etc. Co. vs. Cody, 166 U. S. 606; Isaacs vs. United States, 159 U. S. 487.

3. Said Court of Appeals refused to consider the charge to the jury as a whole, when, if the whole charge had been so considered, any ground of criticism would have been removed (Magniac vs. Thompson, 7 Pet. 348. 390; Spring Co. vs. Edgar, 99 U. S. 645; St. Louis etc. Co. vs. Jeffries, 276 Fed. 73, 78; Chicago etc. Co. vs. McDonough, 161 Fed. 657; Gila Valley etc. Co. vs. Lyon, 203 U. S. 465.

Your petitioner respectfully shows that the principle of law decided by the Circuit Court of Appeals is in conflict with the decisions of this Honorable Court, and with decisions of the courts of appeals of other circuits, and that said decision of said Circuit Court of Appeals, Fifth Circuit, should be corrected by this Honorable Court in order

that same may conform with settled jurisprudence as fixed and established from time to time by this Honorable Court, as all of which is fully set forth in a brief or argument in support hereof, which is attached hereto and filed herewith.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the said Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record of proceedings of said Circuit Court of Appeals had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that said judgment of the said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as may seem proper, and for all of which your petitioner will ever pray.

WILKINSON, LEWIS & WILKINSON,

C. H. LEWIS,

W. S. WILKINSON,

Attorneys.

STATE OF LOUISIANA,
PARISH OF CADDO:

J. D. Wilkinson being duly sworn, says that he is of counsel for the Kansas City Southern Railway Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

.....

Sworn to and subscribed before me on this 4th day of May, 1926.

.....
Notary Public.

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

The petition for the writ of certiorari in this case clearly states the reasons why it should be granted and shows that the decision of the Circuit Court of Appeals for the Fifth Circuit in this matter was in defiance of and contrary to the well established jurisprudence of this Honorable Court.

The opinion, we think, undoubtedly shows that the Circuit Court of Appeals, as a basis for the reversal of the judgment in favor of the petitioner here, injected an issue in the case not raised in the trial court, nor assigned as error in the Court of Appeal and on a general assignment of error to a portion of the charge to the jury by the trial court, predicated error thereon because such general charge was not modified or explained when no request of any kind for such modification or change was made in addition thereto failed to consider the entire charge even when its attention was specifically directed thereto, showing that the modification or explanation which it found necessary was fully given and covered in other portions of the trial judge's charge to the jury.

The jurisprudence as established by this court, we think, fully establishes the doctrine.

1. That an issue not raised in the trial court nor assigned as error on the face of the record can not be considered by the Court of Appeals.

2. On a general assignment of error to a charge of the court to the jury any modification or explanation thereof must be requested in the trial court and the failure to request such modification or explanation bars any relief to the appellant as against such charge if in the main it was correct.

3. That in determining whether any specific portion of the charge is erroneous or not, it is the duty of the court to consider the whole charge to determine whether the modification or explanation was fully given in other portions of the charge.

Before showing just what occurred in the trial court, and the action of the Circuit Court of Appeals in the matter, we desire to briefly discuss the first question and the right of the Court of Appeals to inject an issue in the case not made in the trial court.

In the case of Board of Commissioners vs. Sutliff, 97

Fed. 270, the United States Circuit Court of Appeals of Colorado, said:

> "In an action at law the Circuit Court of Appeals is a court for the correction of errors of the trial court exclusively and questions which were not presented to or decided by that court are not open for review."

The same doctrine has been many times announced by this court and we shall not undertake to cite all of the cases in that respect.

In the case of Wassatch Mining Co. vs. Crescent Min. Co. 148 U. S. 293; 37 L. Ed. 454, this court said:

> "An objection to a decree that it was made in the complainant's favor on grounds not stated in his bill, can not be raised for the first time on appeal."

Again in the case of Canal etc. Railway Co. vs. Hart, 114 U. S. 654; 29 L. Ed. 226 and in the case of Morrill vs. Jones 106 U. S. 466, 27 L. Ed. 267, this court said:

> "A defense can not be made for the first time in the Appellate Court."

Again in the case of Retzer vs. Wood, 109 U. S. 185; 27 L. Ed. 900:

> "In the absence of a statutory rule to the contrary the defense of a statute of limitation, which

> is not raised either in pleading or on the trial or before judgment, can not be availed of."

Again in the case of United States vs. National City Bank of New York, 281 Fed. 754; the U. S. Circuit Court of Appeals of New York, said:

> "The Circuit Court of Appeals on writ of error in a civil case can review only erroneous rules made by the District Court on questions called to its attention and passed on by it."

A writ of error from this last decision was dismissed by this court. See the same case 263 U. S. 726.

These authorities, we think, fully establish the proposition that the Court of Appeals can not raise an issue in a case which was not presented to the trial court and which was not assigned as error in the Court of Appeals. And yet, we submit, under the record in this case, that the Circuit Court of Appeals injected the issue, on which it predicated its reversal, into the case when the same was not raised in the trial court and the same was not assigned as error in the court of appeals.

From the record it appears in the case that, after the jury had been charged in general, it returned unto the Court and requested additional instructions, asking the Court what would constitute contributory negligence on

the part of the plaintiff. (Rec. 265.)

The Court then proceeded to define what would constitute contributory negligence on the part of the plaintiff, and at page 266 the jury again inquired how many different verdicts it might bring in, and the Court instructed the jury in this regard.

Therefore, as reflected at page 267 of the record, counsel for the plaintiff in error stated:

> "With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approxicausing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient."

At page 268 the Court, in response to the question or re-

quest of counsel for the plaintiff, said:

"To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words,

it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued; or he must have omitted to do something which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; **if you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would**

> **contribute to the injury, and would in law, constitute contributory negligence."**

Only part in boldface type is assigned as error. (See Assignment No. 16, Rec. 308.)

After having attempted to comply with the request of the plaintiff to elucidate the matter a little more clearly, the counsel for respondent suggested that there was no plea of an omission to check the speed of the car, and on being assured that there was such plea, the Court then stated that it thought it had covered the pleadings and that it was about as definite as he could make it. Thereupon, the following occurred:

> "Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position except this—"

Thereupon, counsel for the petitioner interposed an objection and counsel for the respondent said nothing further.

A portion of the charge thus given is made the basis of respondent's sixteenth assignment of errors and a portion of the charge thus given is quoted by the Circuit Court of Appeals in its opinion, beginning at the seventh line from the bottom of the page 268.

It will be noted that the plaintiff then said to the Court:

> "I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position, except this—"

But nowhere is it pointed out in the supposed exception in what way and to what extent the Court had not covered respondent's position. Certainly at no time did the respondent except to the failure of the Court to include in its charge to the jury the fact that the negligence of the employee of the petitioner might be found to be the sole proximate cause of the injury and plaintiff's negligence be deemed a remote cause.

Following this conversation between counsel and the Court, at page 270 of the record, the following appears:

> "The court: Gentlemen, I have covered the point sufficiently, and whatever right be sought in the matter can be protected by the proper bill."

> "Mr. Jones: Yes, I am going to except to that portion of the charge."

> "The Court: The plaintiff excepts to the instruction. All right, gentlemen, you may retire."

From this it will be clearly seen that the respondent in error made no exception to the charge in question, unless by a stretch of the imagination it can be said that he excepted to the whole charge.

His assignment of errors, cannot make errors where it is not supported by the record of the case, and the record does not support the sixteenth assignment of error, which is made only to a portion of the charge of the Court, at the time and place in question, and is so general in its terms as not to advise the lower Judge of any error in it. In other words, counsel then took the position that the charge so given by the Court was erroneous altogether.

We, therefore, insist that we are correct in the assertion that the Circuit Court of Appeals injected an issue in this case not raised in the trial court nor assigned as error in said Court of Appeals.

But it is equally clear that on this general assignment of errors to a portion of the charge of the trial court, that the Circuit Court of Appeals found the charge as given correct, but held there was error because this was not modified or explained so as to charge the jury with reference to proximate cause when there was no request for such modification or change.

The assignment of error No. 16 takes just a portion of the charge in question and declares that the respondent excepted to the Court's giving that portion of the charge to the jury, when the record shows that no such exception

was taken to that portion of the charge and when the record shows that the charge given by the Court contained other things and other matters not embraced in the assignment and to which no specific exception was taken. Besides, instead of pointing out to the Court some error in the charge as given, counsel for the respondent declared:

> "I really think you caught my view about it, but we will reserve an exception. The Court has reasonably covered plaintiff's position except this—"

But nowhere states the exception wherein the Court had not reasonably covered plaintiff's position.

We think it is as well settled as anything can be settled, both by the rules of the Circuit Court of Appeal and by the Supreme Court of the United States, that exceptions of such general character to the charge of the Judge are not permissible and will not sustain error predicated thereon.

Rule Ten of the Circuit Court of Appeals provides:

> "But the party excepting shall be required to state distinctly the matters of law in such charge to which he excepts; and those matters of law and those only shall be inserted in the bill of exception and allowed by the court."

Here the respondent did not state distinctly the matters

of law in the charge to which he excepted, and under the rules of the Court only such matters of law as had been clearly pointed out can be considered by it.

In Foster's Federal Practice, 6th. Edition, at Section 701, the rule of the Court is quoted and numerous authorities are cited sustaining the position which requires the plaintiff to set out specially and particularly each error asserted and intended to be urged. In as much as the point now under discussion was not raised in the lower Court, was not discussed in the brief of counsel for respondent, and as we remember it, was not discussed in the oral argument of the case, it is submitted that the Court was in error in reversing the judgment of the jury because of the failure to include in the charge in question a modification or alteration of it.

We think it is as well settled as anything can be that where a charge is given partly correct, or partly incorrect, that an exception to such charge must point out the incorrect part of it, and where a charge given is correct in itself, that any modification or change in it sought by a litigant must be specially requested and an exception must be specially leveled, not at the charge as given, but at the refusal to give the modification or change of it.

In 8 Enc. of Pl. & Pr. 262, the law, sustained by numerous authorities, is thus stated:

> "Exceptions to instructions should specifically point out the alleged errors."

Even if it be conceded that the respondent did take an exception to the charge of the Court, the exception did not specifically point out the alleged errors in the charge.

The same doctrine is announced in 3 C. J. page 845, where the law is thus stated:

> "And, of course, the objection must point out the particular instruction or instructions or part thereof, and a general objection to the instructions or to the charge as a whole is not applicable on appeal, where some of the instructions or parts of the charge are correct."

The Circuit Court of Appeals having found that the charge as given by the Court was correct, held that it was error because the charge was not modified, changed or altered, so as to tell the jury that if the defendant's employee was aware of the respondents negligence in time to have avoided the injury, and did not do so, it would be liable. No such modification was requested and no such charge was requested by the respondent in the trial Court.

We think that the doctrine is now too well settled to admit of any question that the Circuit Court of Appeals

is without right or jurisdiction to set aside the verdict of the jury because of the omission to give a certain charge to the jury by the lower court in the absence of a request for such charge.

In the case of Cooper vs. Schlesinger, 111 U. S. 148, 28 L. E. 382, the Supreme Court of the United States said:

> "A general exception to a charge is of no avail where the charge embraces several distinct propositions and anyone of them is correct."

Here the Circuit Court of Appeals found the charge correct as far as it went, because it has decided that the respondent was, or might have been, guilty of contributory negligence by urging the operation of the handcar at a dangerous rate of speed, and even if the respondent excepted to this charge he should have pointed out the additions or changes which should have been made in it.

Again in the case of Holder vs. United States 150 U. S. 91, 37 L. E. 1010, the Supreme Court of the United States again said:

> "A general exception to a charge which does not direct the attention of the Court to the particular portion of it to which objection is made, raises no question for review."

The statement by counsel for the respondent, as dis-

closed by the record, page 270, that he was going to except to that portion of the charge, did not point out to the lower Court any errors in the charge as given, and if any portion of the charge as given was correct cannot avail the plaintiff on appeal.

Again in the case of Newport News vs. Pace 158 U. S. 36, 39 L. E. 887, the Supreme Court of the United States said:

> "A general exception to the refusal of a series of instructions, will not be considered, if any one of the propositions be unsound."

The declaration by the Supreme Court in the cited case is but the converse of the proposition for which we contend, that where a charge is partially correct and partially incorrect, an exception to the charge which does not point out the incorrect portion of it cannot avail as a basis for an assignment of error in the Appellate Court.

In the case of Norfolk Railway Company vs. Earnest, 229 U. S. 114, 57 L. Ed. 1096, the Supreme Court of the United States again said:

> "Excepting generally to an entire instruction which embodies several propositions of law, to some of which no objection properly can be taken, does not entitle the exceptor to take advantage of

a mistake or error in some single or minor proposition therein."

Mr. Justice Van Devanter, in discussing the matter in this case, said:

> "Not improbably the mistake in the instruction was purely verbal, and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded, and that the one now pointed out was not made. We must, therefore, apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

In the case of Guerini Stone Company vs. Carlin Construction Company, 248 U. S. 334, 63 L. Ed. 275, the Supreme Court of the United States again emphasized this view of the law and said that such a general objection "could not furnish a basis for reversing the judgment."

In the case of Bassell vs. Hines, 269 Fed. 231, the United States Circuit Court of Appeals of the Sixth Circuit said:

> "Error in a portion of a charge is not open on appeal if the attention of the trial court was not directed to that particular subject."

It certainly appears from the record here that the attention of the trial court was not directed to the law as outlined in the opinion of the Circuit Court of Appeals.

In the case of St. Louis Southwestern Railway Company vs. Graham 119 Am. St. R. 112; 83 Ark. 61, 102 S. W. 700, the exact question was presented, and the Court said:

> "It is not reversible error to give an instruction which is in general terms accurate, but which lacks an explanation fitted to the facts to make it entirely accurate in the case at bar, if the explanation is not requested and the attention of the Court is not called to evidence requiring it."

To the same effect see Taylor vs. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Holland vs. Tenn. Coal Co. 91 Ala. 444, 12 L. R. A. 232; Booth vs, Ry. Co. 29 Am. R. 97.

Had respondent called the lower Court's attention to the explanation or modification in question, it doubtless would have been given. But he did nothing of the kind. He did not even specifically except to the portion of the charge as given, let alone suggest any explanation or modification or addition to it, and the Court, we submit, was without right or authority to consider the question.

In his assignment of error No. 16 he assigns the whole part of the charge as error, and does not claim the charge as given should have been changed or modified. He claim-

ed all of it was wrong. The Court found it correct, but says under the evidence the jury might have found that the accident was not the proximate cause of respondent's negligence and, therefore, the Court should have instructed it as to the last change to avoid it, where no request for such instruction was made to the trial Court. Even in the assignment of error no such error is hinted or suggested, and consequently the question was not discussed in the original hearing before the Circuit Court of Appeals.

The doctrine for which we contend is well stated in the case of McKee vs. Tourte lotte, 167 Mass. 69, 48 L. R.A. 542, when the court said:

> "A party fearing that an instruction will be taken by the jury in a broader sense than he deems consistent with the law must call the Court's attention to the language to render it subject to review."

Again in the case of Longan vs. Weltmer, 64 L. R. A. 969, the Supreme Court of Missouri said:

> "A party cannot complain of a general instruction on the measure of damages which is correct as far as it goes, unless he calls the Court's attention to the matter and requests a limitation of the general language used."

In the case of Hall vs. Wear, 92 U. S. 728, 23 L. Ed. 500,

the Supreme Court of the United States said:

> "When the instructions to the jury complained of, so far as given, were correct, if the defendants desired further instructions respecting the matter, it was their duty to ask it."

The Circuit Court of Appeals has found the instructions given were correct and it was the duty of plaintiff, if he desired further instructions, to request it.

In the case of T. & P. Ry. Co. vs. Volk, 151 U. S. 73, 38 L. Ed. 78, the Supreme Court said:

> "The omission of the Court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, where the bill of exceptions does not show that the defendant requested any instruction upon that subject."

In the case of Texas, etc., Ry. Co. vs. Cody, 166 U. S. 606 41 L. Ed. 1132, the Supreme Court said:

> "Failure to request additional instructions if those given on the subject are correct, will prevent an objection to their insufficiency on appeal."

See also Isaacs vs. U. S. 159 U. S. 487, 40 L. Ed. 229; Richardson vs. State, 91 Tex. Crim. 318, 20 A. L. R. 1240; Graham vs. State, 98 Ohio St. 77, 18 A. L. R. 1272.

Numerous other authorities might be cited, but these suffice to demonstrate that the Circuit Court of Appeals was wrong when it reversed the judgment on an issue not

presented to the trial court, not assigned as error in that Court and not even suggested in the printed argument of counsel for the plaintiff in this case.

These authorities, we think, fully demonstrate that the decision of the Court has been rendered, based on an objection not urged in the trial Court, nor in that Court, in the printed or oral argument of counsel for the respondent, and even if it was erroneous, even if the Court should have charged the jury in respect to the matter pointed out in the Circuit Court's opinion, surely it was not obliged to do so in the absence of a request therefor.

In the case of McDermott vs. Sevier, 202 U. S. 600, 50 L. E. 1162, discussing an exception to the charge of the Court, this Court said:

> "The Court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them."

The same doctrine was held in B. & P. Ry. Co. vs.

Mackey, 157 U. S. 39 L. Ed. 224, and we take it that the rule is well settled that plaintiff cannot just simply say that he excepts to a certain portion of a charge without pointing out wherein such charge is in error, and then rely on such a general exception for a reversal of the judgment against him.

We, therefore, insist that on a general assignment of error to a portion of the charge to the jury by the trial court, that the Circuit Court of Appeals in this case found such general charge correct but predicated reversible error therein because this general charge was not modified or explained, when as a fact there was no request for such modification or change.

But we insist that the charge of the Court to the jury should have been considered as a whole and that isolated portions of the charge can not be taken for the purpose of criticisms and reversal, where the matter criticized is fully covered in other portions of the Court's charge to the jury.

In this case, at page 265 of the record (and we refer to the record as appearing in the Circuit Court of Appeals) it appears that the jury having retired to consider its verdict returned unto the Court and asked for further in-

structions as to what would constitute contributory negligence and thereupon the trial court charged them as follows:

> "Well, I don't suppose that there is any objection by either side to further elucidate the question of law. Contributory negligence, gentlemen, such as will defeat recovery, means conduct on the part of the plaintiff **that contributes approximately to the injury.** In other words, if notwithstanding the negligence of the defendant, the plaintiff does something himself **which reasonably contributes to the injury, approximately,** then that is what is known as 'contributory negligence.'" (Our italics throughout.)

Here the Court distinctly told the jury that the negligence of the plaintiff which would defeat recovery **must contribute approximately to the injury,** and this instruction so given by the Court fully covers the objection which the Court of Appeals found to the isolated portion of the charge referred to in its opinion.

Again, at page 266, the Court had fully explained that the negligence of the plaintiff must be the proximate cause of the injury, for he there stated to the jury:

> "Or in any case, where the act of the plaintiff **enters into approximately** the circumstances which bring about the injury, then it is contributory negligence."

At page 251 of the record, the Court further told the jury:

> "However, you are instructed that the plaintiff would not be guilty of contributory negligence approximately causing the injury by merely encouraging the said Merchant to operate the said car."

The Court having sufficiently instructed the jury on the question of proximate cause, error cannot be predicated on his failure in the isolated paragraph referred to by the Court of Appeals in not continuing a similar instruction.

In 14 R. C. L. Sec. 72, page 812, the law, as supported by numerous authorities, is stated as follows:

> "The rule is quite generally accepted that the omission from a charge of certain elements will not require a reversal where such deficiency is fully supplied in other instructions. In applying this rule it has been held that an instruction that is likely to mislead the jury may be cured by others covering the same point in a clear and concise manner; that an instruction which taken by itself is ambiguous, and in one view erroneous, will be cured by another qualifying it, if it is apparent that the jury would not have been misled thereby."

If there was a deficiency in the instruction as quoted

by the court in the part of the charge assigned as error, then such deficiency is fully supplied by the other instructions which we have quoted in this brief.

In the same work, at Sec. 76, page 818, the following is stated as the law and is likewise sustained by numerous authorities:

> "Instructions must be taken as an entirety, that is, each must be considered in connection with others of the series referring to the same subject, and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, no just ground of complaint exists, even though an isolated and detached clause is, in itself, inaccurate or incomplete, and although some of them taken separately may be subject to criticism."

The Court had fully instructed the jury on the subject under investigation and the charge objected to, when taken in connection with the other portions of the charge to which we have called attention, is subject to no just criticism.

In the same work, at page 820, the law, sustained by numerous authorities, is further stated:

> "And, as it is generally impossible to state all of the case in one instruction, a cause will not be re-

> versed on appeal though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge to the jury, if the instructions to them, taken as a whole, correctly state the law. Therefore, though each instruction fails to carry qualifications which are explained in others, there is no error."

The only objection to the charge here under investigation interposed by the Court of Appeals and not by any exception on the part of the plaintiff, is that the particular portion of the charge quoted in the opinion of the court does not fully state the law applicable to the question, but the instructions taken as a whole correctly state the law and correctly instruct the jury that the negligence of the plaintiff in order to defeat recovery must have been the proximate cause of the injury, and while this isolated portion of the charge failed to carry this qualification, it was fully explained in other portions of the charge and, therefore, there was no error.

In Zoline's Federal Appellate Jurisdiction and Procedure, at Sec. 147, page 93, that learned author says:

> "Each portion of the charge to the jury must be considered in its relation to the entire charge."

Considering the portion of the charge here under investigation in its relation to the entire charge of the

Judge to the jury, any ambiguities or omissions therein are fully explained and fully covered in the general charge of the court.

In the case of Chicago Great Western Railway Co. vs. McDonough 161 Fed. 657, the Circuit Court of Appeals had under consideration this question and in passing on the matter said:

> "In examining the charge, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single or detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts."

> "A general exception to a considerable portion of the charge cannot be regarded as presenting a specific objection to a lesser portion, which in fairness to the trial court should have been specially called to its attention, in order that the appropriate correction might be made."

In this case the court, through Mr. Justice Van Devanter, now a member of this court, at page 660, said with reference to the charge of the Judge to the jury:

> "But some portions of it, if separated from the rest, would be justly regarded as objectional. That, however, is not a fair test of their meaning,

for as was said in Magniac vs. Thompson 7 Pet. 348, 390, 8 L Ed. 709, and Spring Co. vs. Edgar, 99 U. S. 645, 659, 25 L. Ed. 487:

"In examining the charge, for the purpose of ascertaining its correctness in point of law, **the whole scope and bearing of it must be taken together.** It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language **of other parts of the charge.** In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered.

"A reading of the entire charge makes it plain that the faults in the portions covered by these assignments were inadvertent, rather than intentional, and were so fully corrected by the effect of the charge as a whole that the jury could not have been misled or confused by them. They, therefore, afford no ground for complaint. Railroad Co. vs. Gladmon, 15 Wall, 401, 409, 21 L. Ed. 114; Evanston vs. Gunn, 99 U. S. 660, 668, 25 L. Ed. 306; Baltimore & Potomac R. R. Co. vs. Mackey, 157 U. S. 72, 86, 15 Sup. Ct. 491, 39 L. Ed. 624." See also Bennet vs. U. S. 227 U. S. 333; Agnew vs. U. S. 165 U. S. 36."

In the case of St. Louis & S. F. Ry. Company vs. Jeffries, 276 Fed. 76, the court at page 78 said:

> "We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and it if appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism is not important."

While the passage here quoted by the Court of Appeals, if standing alone and if excepted to, might be subject to criticism, yet taken in connection with the charge as given by the court to the jury in its general charge, indeed in what the court told the jury at the same time that it gave the charge that is objected to, the question is fully covered and **the jury was fully instructed that the negligence of the plaintiff in order to defeat recovery, must have been the proximate cause of his injury and not the remote cause.**

A case particularly applicable to the point here under consideration is presented in Gila Valley, etc., Co. vs. Lyon 203 U. S. 465; 51 L. Ed. 276. In that case the court had charged the jury that unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable. It was held that even if erroneous in that "sole cause" is not synonymous with "proximate cause," the defendant was not preju-

diced where further instructions given at its request were to the effect that if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the Supreme Court, in passing on the matter, said that the defendant received no prejudice from the charge as given, and said:

> "If the defendant had desired to obtain a more specific charge in relation to the distinction between 'sole' and 'proximate' cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word 'sole,' and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. Congress & E. Spring Co. vs. Edgar 99 U. S. 659, 25 La. Ed. 487, 491. The requests to charge as given shows the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause the plaintiff could not recover."

Here, the Judge did charge the jury that the negligence of the plaintiff must have been the proximate cause of the injury, particularly at pages 265 and 266 of the record from which we have quoted.

If the respondent desired to obtain a more specific charge

in relation to the distinction between the sole and proximate cause of the accident, the lower court should have had its attention specifically drawn to the objection, which was not done in this case.

The respondent, having assigned as error only a portion of the charge in his sixteenth assignment, the Circuit Court of Appeals found that this charge was in part justified. It found that the respondent was guilty of contributory negligence because at pages 3 and 4 of its opinion it discusses the questions at length and cites authorities holding that a passenger may be guilty of contributory negligence and held that a part of the charge which related to his contributory negligence was correct.

Having held with petitioner at page 5 of its opinion, the Court found for the respondent on an issue not raised in any exception taken to the charge of the Court, or any contention made in the trial of the case in the lower Court or in the brief of counsel.

The Circuit Court of Appeals first stated:

> "Under the above set out instructions to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care, situated as he was, would have realized that it was dangerous to remain on the car."

Having approved this instruction in its entirety and having found that the instruction was correctly given, and stating the law, at page 5 of its opinion, the Court said:

> "Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury and plaintiff's negligence be deemed a remote cause." (Authorities.)
>
> "The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it. The instruction in question was erroneous."

Let it not be forgotten that the Court had already approved the instruction in every particular.

The contention which we have last quoted was not embraced in the charge of the lower court and no such modification, change or alteration of the charge given was requested on behalf of the respondent.

Of course, it will be conceded that his right to recover was not barred if his negligence was only a remote cause of his injury and Merchant's negligence was the sole proximate cause of it. But no such issue was presented to the

jury who tried the case and no requested instruction to that effect was made on behalf of the respondent in the trial court, nor was any such contention made by him in his argument in the Circuit Court of Appeals.

If the charge as given by the Court was correct in the main, and needed a modification or change, it was clearly the duty of the respondent to indicate to the trial Court the change or modification desired, and he cannot on appeal, under an exception to the whole charge, have the Court interpose an exception for him, which he himself did not make.

From these authorities it is submitted that the decision of the Circuit Court of Appeals in this case is in conflict with and contrary to numerous decisions of this Honorable Court and in conflict with the decisions of all of the other Circuit Courts of Appeal and for that reason the writ of certiorari should issue in order that the jurisprudence in the Federal Courts on these questions may be uniform.

The case in question is one of great importance to railroads, and in addition to that the decision of the Circuit Court of Appeals being in conflict with the decisions of other Circuit Courts of Appeal and in conflict with the decisions of this court, in order to secure uniformity of de-

cisions the writ applied for should be granted.

In the case of American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372, this court in speaking of the power to grant such writs and when they should be granted, said:

> "The jurisdiction of this court to require, by certiorari or otherwise, a case to be certified from the Circuit Court of Appeals, to this court for its review and determination, should be exercised only in cases of gravity and importance, **or in order to secure uniformity of decision.**"

The same doctrine was announced in the case of Warner vs. New Orleans, 167 U. S. 467, 42 Law Ed. 239.

Inasmuch as the case here is one of great importance and inasmuch as the decision of the Circuit Court of Appeals is in direct conflict with the numerous decisions of this court, it is submitted that the writ should be granted.

Respectfully submitted,

WILKINSON, LEWIS & WILKINSON,

.....

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PETITIONER'S BRIEF

Office Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT AND BRIEF OF PETITIONER.

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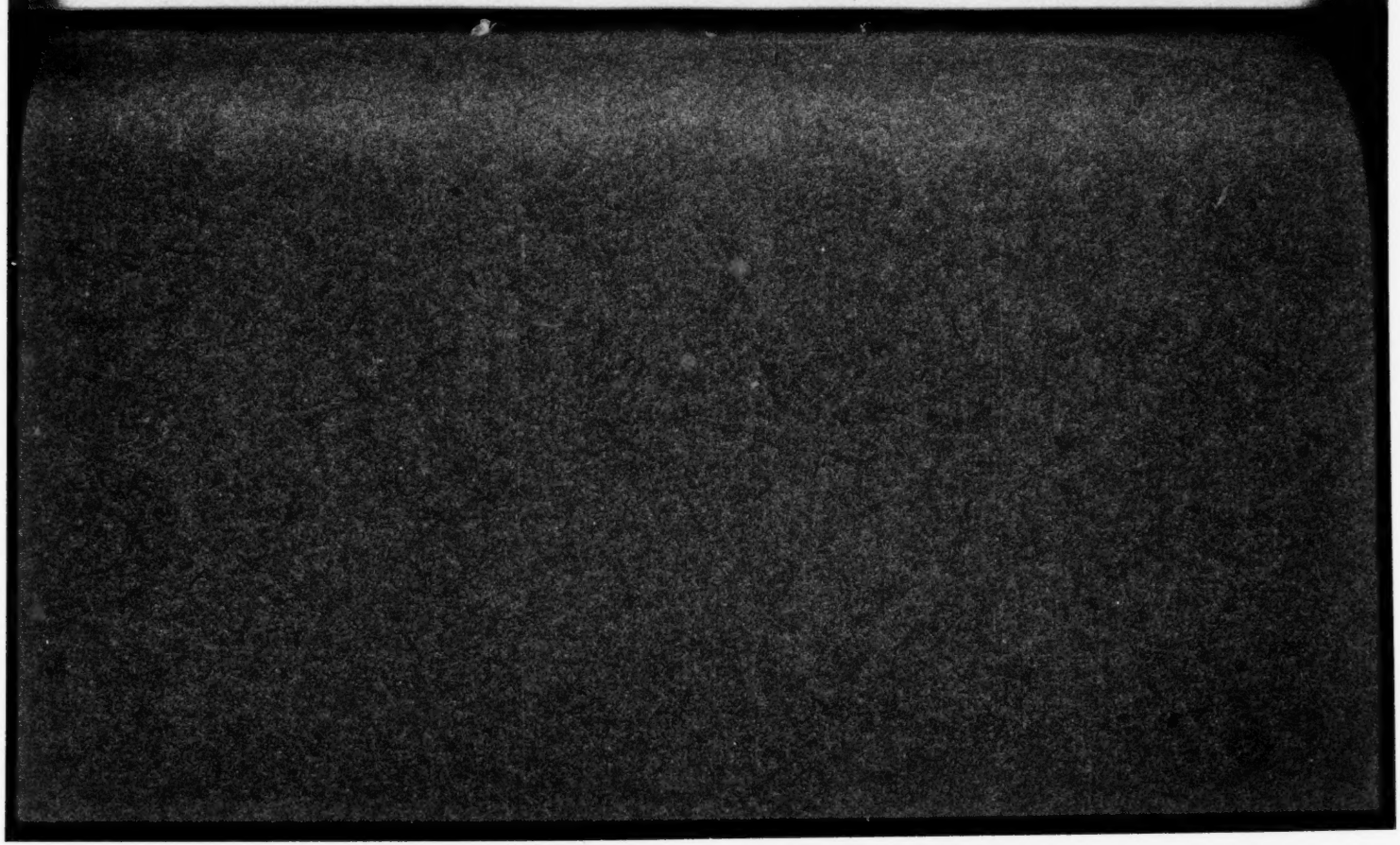

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No. 369.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT AND BRIEF OF PETITIONER.

The petitioner seeks to review the action of the Court of Appeals for the Fifth Circuit (*Ellzey* v. *Kansas City Southern Ry. Co.*, 12 Fed. (2d) 4), in reversing a judgment in favor of your petitioner. The case is here by order of this court of July 7, 1926 (R. 244) granting petitioner's application for a writ of certiorari to said court of appeals.

The action is one for personal injuries received by the respondent, R. E. Ellzey (hereinafter for convenience sometimes called the "plaintiff"), a citizen of Louisiana, in the derailment of a motor car of the petitioner, The Kansas City Southern Railway Company (hereinafter for convenience sometimes called the "defendant"), a Missouri corporation,

on defendant's railway, near Rosepine, Louisiana (north of DeQuincy, Louisiana), on to-wit: August 10, 1922. At the time of his injury plaintiff was acting as a United States Deputy Marshal, and was engaged, as such, in protecting employes of the defendant during the general strike of railway shopmen in the summer of 1922 (R. 24, 25). While so engaged he was assigned to guard T. M. Merchant, a telegraph lineman employed by the defendant, Merchant being then ordered to locate and repair trouble on the telegraph line of defendant south of Leesville and north of DeQuincy, in Louisiana (R. 33). They went south to DeQuincy (R. 34, 35), where they procured the motor car in question (R. 36, 37), and then proceeded north on the line of the defendant and located the trouble at Singer, a point south of DeRidder, Louisiana (R. 38). After the telegraph line repairs had been completed Merchant and plaintiff proceeded north on the motor car (R. 39), and, after passing DeRidder (R. 40), the motor car left the track near Rosepine, Louisiana (R. 40), and plaintiff was injured (R. 41). This action was instituted in the District Court of the United States for the Western District of Louisiana to recover damages for those injuries, the amount claimed being $60,000.00 (R. 7). One of the grounds of liability charged by the plaintiff was that the derailment was caused by Merchant's negligence in operating the motor car at a dangerously high rate of speed (R. 5, 9). One of the grounds of defense alleged by defendant was that plaintiff proximately contributed to his own injury in that he assumed the control and direction of the motor car and induced or acquiesced in the operation of the car at an excessive and dangerous rate of speed (R. 17), and there was evidence supporting this defense (R. 148, 149, 135). The district court instructed the jury on the issues of negligence and contributory negligence, and in its charge on the issue of contribu-

tory negligence told the jury, amongst other things, that if the plaintiff caused the car to be run at a reckless and high rate of speed, or if he saw it was being negligently run, and knew that it was dangerous to continue to so operate it, and made no protest, or effort to protect himself, then his contributory negligence would be a bar to his right to recover. A judgment was returned in favor of the defendant, and plaintiff took the case by writ of error to the Court of Appeals for the Fifth Circuit, where the judgment was reversed and the cause remanded, on the ground that the portion of the charge above referred to was erroneous, the ruling of the Court of Appeals being that even if Merchant and plaintiff might both have been negligent as to the rate of speed at which the motor car was run the negligence of Merchant might have been the proximate cause and plaintiff's the remote cause, in which event the plaintiff's negligence would not bar his right to recover. The defendant contends that this ruling was erroneous, because the jury was fairly and correctly instructed on the issue of whether or not plaintiff was guilty of contributory negligence, and whether or not such negligence was a proximate cause of his injury, and because no objection or exception presenting the question on which the decision of the Court of Appeals was based was made or saved by the plaintiff. That portion of the charge of the District Court which was condemned by the Court of Appeals, and other portions of the charge bearing on the issue of plaintiff's contributory negligence, and whether it was a proximate cause of his injuries, and the actions of plaintiff and of the court in reference to such portions of the charge, are set forth in detail in the following brief, in the discussion of the questions involved in this proceeding. The case has been brought to this Court by certiorari on the petition of the defendant, and the defendant, your petitioner, respectfully states that the judgment and decision of the Court of Appeals are erroneous and in conflict with the decisions of this Court, and with decisions of other United States Circuit Courts of Appeals, in the particulars set forth in the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The Court of Appeals erred in holding that the following portion of the District Court's charge to the jury was erroneous:

> "If you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence" (R. 205, 206).

2. The charge by the District Court to the jury, considered as a whole, correctly and fairly stated the law on the issues made by the pleadings and the evidence, and the Court of Appeals erred in considering only a detached passage of the charge, and in refusing to consider such charge as a whole, and in holding to be erroneous that portion thereof set forth in the first assignment of error.

3. The plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that part of the District Court's instruction condemned by the Court of Appeals, and the Court of Appeals erred in not holding that the plaintiff had waived his right, if any he had, to object to said charge.

BRIEF OF THE ARGUMENT.

I.

The District Court's charge to the jury, considered as a whole, correctly and fairly stated the law on the issues made by the pleadings and the evidence, and the Court of Appeals was not justified in holding that such charge was erroneous.

After the District Court had fairly and correctly instructed the jury on the issues made by the pleadings and the evidence, including the issue of plaintiff's contributory negligence, the jury retired to consider of their verdict, and thereafter returned into open court with a request for further instruction as to what would constitute contributory negligence on the part of the plaintiff. Thereupon the following proceedings were had (R. 203-206):

> The Court: Well, I don't suppose that there is any objection by either side to further elucidating the question of law. Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that contributes approximately to the injury. In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself which reasonably contributes to the injury, approximately, then that is what is known as "contributory negligence." For instance, if a man—a railroad train was being operated without a proper lookout at a crossing, and a person with no regard for his own safety, carelessly walked upon the track in the face of an approaching train, and was struck, that would be, in law, contributory negligence; or in any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. In other words, if in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through

its agents, who, though found from the evidence, were acting within the scope of the employment but notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraging in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery. The burden of proving contributory negligence rests upon the defendant. It is a special defense specially pleaded, and must be supported by the evidence, by a fair preponderance, just as the plaintiff must support the charges of negligence on the part of the defendant by a fair preponderance of evidence.

I believe that substantially covers the point upon which you desire instructions. * * *

Mr. Jones: With reference to the instruction on contributory negligence, we call attention to the fact that conduct upon the part of the plaintiff that would operate as contributory negligence in law, approximately causing the injury, would have to be negligent conduct—that is, such conduct as a man of ordinary care and prudence could not have been guilty of under the same or similar circumstances, having the opportunity and information, etc., the plaintiff had at the time. The idea being this: that if the plaintiff was a passenger, as we think he was, on the car, that conduct upon his part, to constitute contributory negligence must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence, and request that Your Honor elucidate that a little more clearly. Just the mere fact that he might have done something that brought about the injury would not be sufficient.

The Court: To state the matter a little more clearly, gentlemen, in order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued, or he must have omitted to do something

which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other words, coming more particularly to the case in hand; *if you should find that in this case the plaintiff urged directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence.* I think that covers it.

Mr. Jones: There is no plea of an omission to check the speed of the car, if Your Honor please.

Mr. Lewis: There is, Your Honor.

Mr. Jones: Is there?

Mr. Lewis: It is definitely set forth in the answer.

The Court: I think it is covered by the pleadings. Gentlemen, that is about as definite as I think I can make it.

Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this—

Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill.

Mr. Jones: Yes, I am going to except to that portion of the charge.

The Court: The plaintiff excepts to the instruction. All right, gentlemen, you may retire.

(The jury then again retired to consider of its verdict.) (R. 203-206.)

In *Henderson* v. *Pennsylvania etc. Co.*, 103 C. C. A. 135, 179 Fed. 577, 582, the court quoting in part from *Davis* v. *Chicago etc. Co.*, 88 C. C. A. 496, 159 Fed. 18, said:

" 'Under the facts of this case, the relation that plaintiff sustained to his companion Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. * * *'

"Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called on him to stop before attempting the passage. The machine was under control, by his own account, only moving at a two-mile rate. Under the circumstances he was called on to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident." (Petition for Writ of Certiorari denied, *Henderson* v. *Pennsylvania R. Co.*, 223 U. S. 718, 32 S. C. R. 522.)

Bradley v. *Missouri Pacific R. Co.* (C. C. A.), 288 Fed. 484, 488 *et seq.*

Southern Railway Co. v. *Priester* (C. C. A.), 289 Fed. 945, 948, 949.

"As the undisputed evidence established that Anderson was in a position to see the danger as fully as Engstrom, and made no objection to Engstrom's attempt to cross in front

of the moving train, he is affected to the same extent Engstrom was."

Engstrom, Administrator of Estate of Anderson v. *Canadian Northern Ry. Co.* (C. C. A.), 291 Fed. 736, 741.

It appears from the foregoing authorities that the plaintiff's negligence, if any, was of the same character as Merchant's negligence, if any, and that there is no legal ground for assuming in such circumstances that plaintiff's negligence might be a remote cause and Merchant's negligence a proximate cause of the accident.

b. But if it were possible that in such circumstances negligence of Merchant might be a proximate cause, and plaintiff's negligence a remote cause, then the question of whether or not plaintiff's negligence was a proximate cause would be one for the jury; and the charge of the District Court clearly and repeatedly pointed out to the jury that the plaintiff's negligence must be a proximate cause of the accident to bar his recovery.

The court told the jury (R. 189) that if the plaintiff "personally was guilty of no negligence himself; that he in no way contributed to any improper operating of the car, and he was injured by the defendant in this case because of a faulty or defective condition of the car or because of an excessive running of the car at an excessive rate of speed," then the verdict should be for the plaintiff.

Again, the court told the jury (R. 190) that "if the plaintiff in no wise urged or contributed to the fast running of that car, then the plaintiff would be entitled to recover, but if the plaintiff did urge the operation of that car at a fast rate of speed, or if he contributed to it in any way; or if, after seeing the danger, or knowing that the car was being operated at an excessive, wild rate of speed, he had reason to believe

that an accident would happen and that he would be injured thereby, it was his duty at the first opportunity available to him, to refuse to continue in such dangerous situation, and thereby avoid the danger to himself."

"Again, you are instructed that the plaintiff would not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence so situated would have abandoned the car.

"With reference to the defense of contributory negligence, you are instructed that it was the duty of the plaintiff to exercise ordinary care; that is, such a degree of care as a person of ordinary care and prudence would exercise under the same or similar circumstances to avoid injury to himself, and failure on his part to do so would constitute contributory negligence" (R. 191, 192).

"Again, you are instructed that the burden is upon the defendant to establish contributory negligence upon the part of the plaintiff" (R. 192).

Again, "If the plaintiff should suggest that the car be operated at a faster rate than that at which it was being operated, which within itself did not constitute apparent negligence, then the fact that he urged the faster speed, if the car was merely going at a low rate of speed, would not be negligence.

"In other words, he would have to encourage such rate of speed which within itself, to an ordinary, reasonable man who had the knowledge that the plaintiff had in this case, of the conditions which the evidence shows that he had, that it would be dangerous to so operate the car. In other words, he must simply exercise reasonable common sense, and if he knowingly encouraged a high rate of speed, he should

be bound to expect the consequence which would flow from the negligence in operating the car, but he would not be held to such condition if the extent to which he urged the faster rate of speed did not reasonably to a man in his situation indicate that it would be dangerous" (R. 193).

After the jury had retired, they returned into open court, as we have seen, and asked for further instructions as to what would constitute contributory negligence on the part of the plaintiff. The court, in its additional instruction, as we have already seen, said, in part: "Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that contributes approximately to the injury. In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself which reasonably contributes to the injury, approximately, then that is what is known as 'contributory negligence.' • • • In any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. • • • The burden of proving contributory negligence rests upon the defendant" (R. 203, 204).

Answering the suggestion of plaintiff's counsel the court further said: "In order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued, or he must have omitted to do something which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other

words, coming more particularly to the case in hand;" (here follows the portion of the instruction which the Court of Appeals held to be erroneous) (R. 205).

When that portion of the court's charge which was condemned by the Court of Appeals is considered in connection with the charge as a whole it seems clear to us that the Court of Appeals was not justified in its ruling even though the portion condemned were erroneous in itself.

The rule is well established that in determining the question of whether a charge to the jury correctly and fairly states the law, the charge should be examined as a whole.

In *Chicago Great Western Railway Co.* v. *McDonough,* 88 C. C. A. 517, 161 Fed. 657, 660, the plaintiff in error contended that portions of the charge of the District Court to the jury were erroneous. The Court of Appeals, through Mr. Justice Vandevanter, then a member of that court, said in denying the contention:

> "But some portions of it, if separated from the rest, would justly be regarded as objectionable. That, however, is not a fair test of their meaning, for as was said in *Magniac* v. *Thompson,* 7 Pet. 348, 390, 8 L. ed. 709, and *Spring Co.* v. *Edgar,* 99 U. S. 645, 659, 25 L. ed. 487:
>
> "'In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered.'
>
> "A reading of the entire charge makes it plain that the faults in the portions covered by these assignments were inadvertent, rather than intentional, and were so fully corrected by the effect of the charge as a whole that the jury could not have been misled or confused by them. They, therefore, afford no ground for complaint. *Railroad Co.* v. *Gladmon,* 15 Wall, 401, 409, 21 L. Ed.

114; *Evanston* v. *Gunn*, 99 U. S. 660, 668, 25 L. Ed. 306; *Baltimore & Potomac R. R. Co.* v. *Mackey*, 157 U. S. 72, 86, 15 Sup. Ct. 491, 39 L. Ed. 624."

See also *Agnew* v. *U. S.*, 165 U. S. 36, 50.

In *St. Louis & S. F. Ry. Company* v. *Jeffries*, 276 Fed. 76, 78, the court said:

> "We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and if it appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism is not important."

In *Boyd* v. *United States*, 271 U. S. 104, 107, 108; 46 Sup. Ct. 442, 443, a physician was convicted of violating an anti-narcotic act. Complaint was made in this court that a portion of the charge of the District Court was erroneous, but this Court held that, although the portion in question might be ambiguous, "it did not stand alone, but was to be taken in connection with what preceded it, and also what followed."

II.

The plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that part of the District Court's instruction condemned by the Court of Appeals, and that Court should have held that the plaintiff had waived his right, if any he had, to object to such instruction.

At the conclusion of the District Court's main charge to the jury the court asked counsel if there was anything else to be covered (R. 199). The only objection made by the plaintiff to the court's charge on the issue of plaintiff's contributory negligence in reference to the speed of the automobile was as follows:

"The mere supposed passenger riding in dangerous places, which we don't think is material here, because the proof shows that he was a passenger on this car. I had a memorandum here with reference to common dangers from the interruption of contributory negligence, but I think that any criticism I would have on that is cured by other portions of Your Honor's charge. I think you made it very clear as a whole, but I think that in the special charge you instructed the jury that, with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed (R. 200).

We have already set forth in Point I of this brief the additional charge on the issue of contributory negligence after the jury had returned for further instructions, and the proceedings incident to such additional charge. The record shows clearly that the District Court was earnestly endeavoring to comply with all reasonable suggestions of plaintiff's counsel, and to fairly present to the jury the law of the case, and that plaintiff's counsel did not, in any manner, suggest to the District Court the point upon which the Court of Appeals made its decision. At the risk of unnecessary repetition we set forth again just what was said by counsel and the court at the conclusion of the additional charge:

Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this—

Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill.

Mr. Jones: Yes, I am going to except to that portion of the charge (R. 206).

The plaintiff did not state what was his objection to the instruction, nor to what portion of it he was excepting.

The instruction as given by the District Court presents the same principle that was suggested in plaintiff's requested special instruction (R. 209):

> "* * * Again you are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. * * * It was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence. * * *"

As stated by plaintiff's counsel (R. 199), the rule requires exceptions to be taken to the charge before the jury has retired; and as stated by the District Court (R. 199), the reason for this rule in taking the exceptions at that time "is to give the court an opportunity to correct the mistakes, if there be any."

A general exception to a charge is of no avail where the charge embraces several distinct propositions and any one of them is correct.

Cooper v. *Schlesinger*, 111 U. S. 148.

"The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject."

Texas etc. Co. v. *Volk*, 151 U. S. 73, 78.

"It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections which, in fairness to the court, ought to have been called to its attention in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically, the part of the instructions regarded as erroneous."

McDermott v. *Severe*, 202 U. S. 600.
Holder v. *United States*, 150 U. S. 91.
Baltimore etc. Co. v. *Mackey*, 157 U. S. 72, 87.
Newport News v. *Pace*, 158 U. S. 36.
Isaacs v. *United States*, 159 U. S. 487, 490, 491.
Texas etc. Ry. Co. v. *Cody*, 166 U. S. 606.
Guerini Stone Co. v. *Carling Construction Co.*, 248 U. S. 334.

In *Chicago Great Western Railway Co.* v. *McDonough*, 88 C. C. A. 517, 161 Fed. 657, the court held that a general exception to a considerable portion of the charge cannot be regarded as presenting a specific objection to a lesser portion, which in fairness to the trial court, should have been specifically called to its attention in order that the appropriate correction might be made, the court saying:

"If the defendant entertained any fear that the jury would be misled or confused by that which was faulty, it should, in fairness to the court, have specially called attention thereto in order that the appropriate correction could be made."

In *Bassell* v. *Hines* (C. C. A.) 269 Fed. 231, an action for personal injuries, the plaintiff complained that the Dis-

trict Court had erred in instructing the jury on the question of burden of proof. In denying the plaintiff's contention the Court of Appeals said:

> "The only exception taken was in these words: 'We except to the charge concerning the hassock being pushed into the aisle by a passenger or a third person and the consequent non-liability of the defendant.' This exception related to the whole charge upon this subject. A great part of such charge was unquestionably correct. That fraction which related to the burden of proof was not separately excepted to, nor was the attention of the court directed to that particular subject. The exception was unavailing to raise the question upon which plaintiff in error now relies."

As stated by this court in *Norfolk Railway Company* v. *Earnest*, 229 U. S. 114.

> "Not improbably the mistake in the instruction was purely verbal, and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded, and that the one now pointed out was not made. We must, therefore, apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

In *Boyd* v. *United States*, 271 U. S. 104, 108, *supra*, complaint was made that a part of the charge of the District Court to the jury was erroneous. It was shown that when the charge was considered as a whole, it was not subject to criticism. The court further said that no proper objection was made by the defendant, or exception taken by him; that at the conclusion of the court's charge the defendant asked for an additional instruction, which was given.

"With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor. It evidently was regarded as consistent and satisfactory. Besides, in view of what was said in other parts of the charge, we are justified in assuming that, had the court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly, after permitting it to pass as satisfactory then, the defendant is not now in a position to object to it. *McDermott* v. *Severe*, 26 S. Ct. 709, 202 U. S. 600, 610, 50 L. Ed. 1162; *United States* v. *U. S. Fidelity Co.*, 35 S. Ct. 298, 236 U. S. 512, 529, 59 L. Ed. 696; *Norfolk & Western Ry. Co.* v. *Earnest*, 33 S. Ct. 654, 229 U. S. 114, 119, 120, 57 L. Ed. 1096, Ann. Cas. 1914C, 172." (46 S. Ct. 443.)

It has been said by a great lawyer, who once graced the Supreme Court of Missouri:

"It has become a trite common-place of the rules of appellate procedure that a general objection, in a case where the evidence is competent for any purpose, may not be laid in the record below (to use a homely simile) as an egg to hatch later in the appellate court into precise and definite objections—objections the point to which was concealed from the trial court and from opposing counsel and first came out of ambush and into sunlight in briefs to this court."

Bragg v. *Metropolitan Street Railway Co.*, 192 Mo. 331, 342, 343. Lamm, J.

The Circuit Court of Appeals "on writ of error in a civil case can review only erroneous rulings made by the trial court on questions called to its attention and passed on by it."

United States v. *National City Bank of New York*, (C. C. A.) 281 Fed. 754 (Writ of Error denied, 263 U. S. 726).

Wasatch Mining Co. v. *Crescent Min. Co.*, 148 U. S. 293.

Canal etc. Railway Co. v. *Hart*, 114 U. S. 654.

Retzer v. *Wood*, 109 U. S. 185.

Board of Commissioners v. *Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 275.

The rules established by the foregoing authorities are particularly applicable to the case at bar. If Merchant was negligent in running the motor car at an excessive rate of speed and plaintiff was negligent in acquiescing in its being so run without objection, and if, in such circumstances, Merchant's negligence might be a proximate cause of the accident and plaintiff's negligence be only a remote cause, the distinction between the negligence of the one and the negligence of the other would be fine, indeed, and the plaintiff desiring to have that distinction made should have presented his contention to the court by clear and proper objection and exception. We have seen that he entirely failed in that regard.

The ruling of this court in *Gila Valley etc. Co.* v. *Lyon*, 203 U. S. 465, is particularly applicable to the point here under consideration. In that case the trial court had charged the jury that unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable. It was held that even if erroneous, in that "sole cause" is not synonymous with "proximate cause," the defendant was not prejudiced where further instructions, given at its request, were to the effect that if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the court's attention was not specifically drawn to the objection to the word "sole," this Court saying:

> "If the defendant had desired to obtain a more specific charge in relation to the distinction between 'sole' and 'proximate' cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word 'sole,' and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. *Congress & E.*

Spring Co. v. *Edgar*, 99 U. S. 645, 659, 25 La. Ed. 487, 491. The requests to charge as given show the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause the plaintiff could not recover."

For the reasons above given we pray that the judgment of the Court of Appeals be set aside, and the judgment of the District Court be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1908

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER

vs.

B. E. ELLERY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

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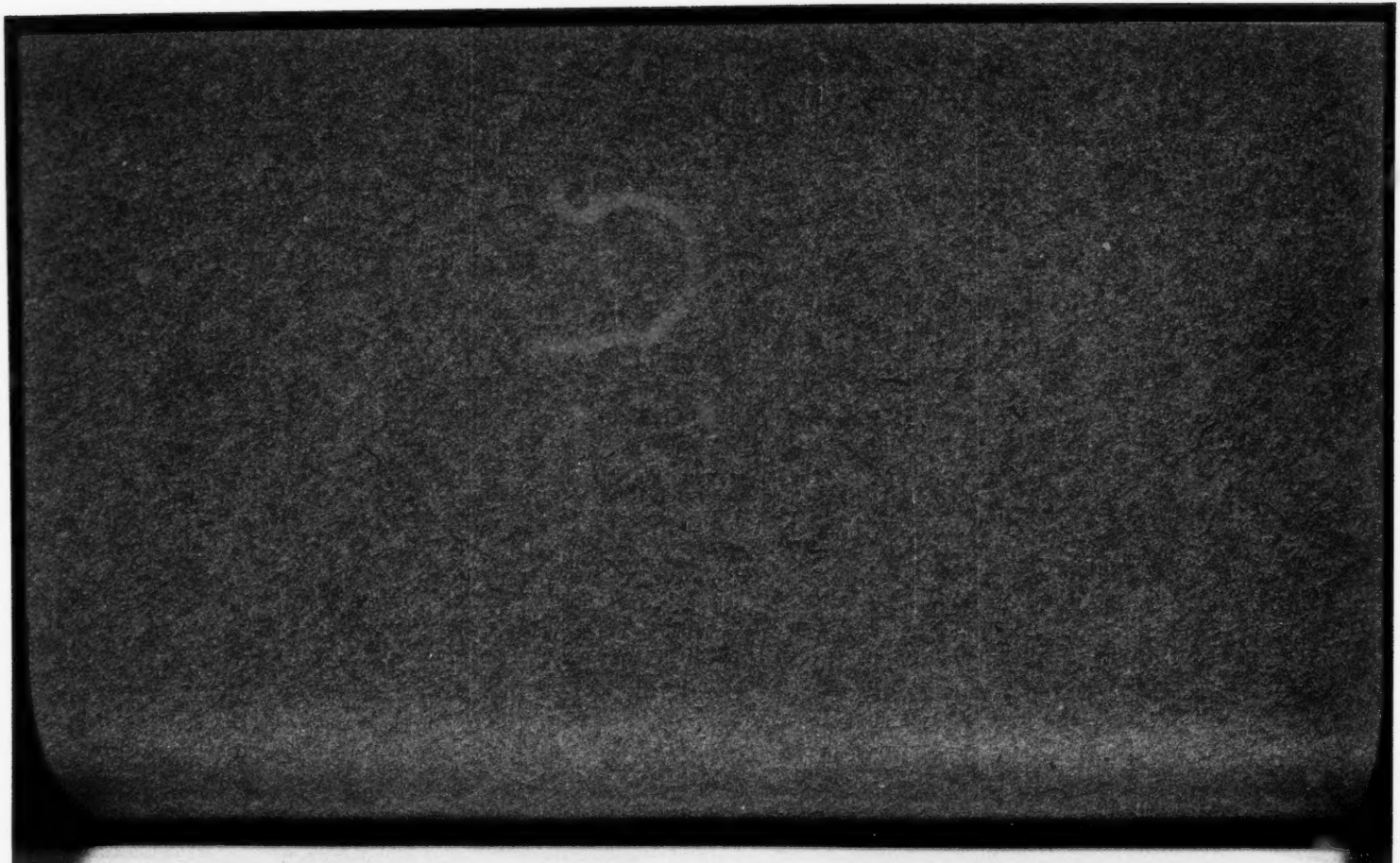

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No. 63.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The respondent, R. E. Ellzey, will sometimes be referred to herein as the plaintiff, and the petitioner. The Kansas City Southern Railway Company, as the defendant (figures in parenthesis refer to pages of the printed transcript of the record).

I.

ISSUES RAISED IN THE PETITION FOR CERTIORARI.

On pages 2 and 3 of his brief plaintiff makes the following statement, giving his version of the issues raised by the petition for certiorari, and his contentions in reference thereto:

The jury retired to consider their verdict and later returned into court, and asked what would constitute contributory negligence on the part of the plaintiff. The court told them in substance that if the plaintiff acquiesced in fast running, he would be guilty of contributory negligence, and did not explain that if the driver with knowledge of such conduct on the part of the plaintiff, thereafter negligently caused the injury, that the jury might find plaintiff's negligence to be the remote, and the driver's negligence the direct or sole cause of the wreck, and thereby acquit the passenger of contributory negligence.

The plaintiff objected to this charge, but was not given (in fact was denied) opportunity to explain his reasons for objecting to it—in that the defendant protested against plaintiff being permitted to state his objections, and the court acquiesced in the position taken by the defendant, and declined to permit the plaintiff to make full objections.

The circuit court of appeals reversed the case because—the court erred in giving the charge on contributory negligence, which directed the jury to find plaintiff guilty of contributory negligence if he acquiesced in fast speed, though such negligence may have been remote, and the subsequent negligence of the driver, the direct or sole cause of the wreck.

We do not agree with plaintiff's statement as to the issues before this court, nor as to the proceedings in the district court. The questions here under consideration are, whether, as held by the court of appeals, the district court erroneously instructed the jury on the issue of plaintiff's contributory negligence, whether the plaintiff saved proper exceptions to the alleged errors in the charge, so as to bring the issue be-

fore the court of appeals, and whether plaintiff was prevented from saving such exceptions.

Taking up these propositions in order, and answering the above quoted contentions of plaintiff:

1. The district court's instructions were correct for the following reasons:

(a) The district court fully and fairly charged the jury, on the issue whether plaintiff's contributory negligence might bar his right to recover.

Plaintiff asserts that the court did not instruct the jury that the plaintiff's negligence might have been the remote and the lineman's negligence the direct or sole cause of the accident, and that such omission constituted error. The court, however, as shown by the record, told the jury that contributory negligence, such as would defeat plaintiff's recovery, must be conduct which contributed proximately to his injury (203); and that, to constitute negligence on plaintiff's part in encouraging or acquiescing in the operation of the motor car at a high rate of speed, the jury must find that it would be apparent to an ordinarily prudent person possessing the knowledge that plaintiff had in this case that such speed was dangerous, and that injury might reasonably be expected therefrom (193, 205). See the discussion of this question in paragraph (b), pages 10 to 13 of plaintiff's original brief.

(b) The court's charge must be considered as a whole, and, so considered, it correctly states the law. See the discussion of this question on pages 13 and 14 of petitioner's original brief.

(c) There was no warrant, under the pleadings, or under the evidence, for the giving of an instruction based upon the last clear chance doctrine, and the court of appeals erred in holding otherwise.

2. Plaintiff made no objection and saved no exception to the instructions upon the ground on which the court of appeals' decision is based, and the decision of the court of appeals is erroneous for that reason.

3. The plaintiff had full opportunity to state his exceptions.

We have discussed, in our original brief, the propositions stated above in paragraphs 1 (a) and 1 (b), and it is not necessary to discuss them further here.

We shall therefore proceed with the discussion of the proposition presented in paragraph 1 (c).

1. (c) There was no warrant, under the evidence, for the giving of an instruction based upon the last clear chance doctrine, and the court of appeals erred in holding otherwise.

In view of the contentions made by the respondent, and of the decision of the court of appeals, it seems advisable to give a summary of all the evidence which was before the jury on the subject of contributory negligence.

Ellzey was a United States Deputy Marshall who was detailed by the department of justice to guard employees of petitioner during the shopmen's strike in 1922. At the time of the accident, he had been sent with T. M. Merchant, a telegraph lineman employed by petitioner, for the purpose of guarding the lineman

while the latter was engaged in locating and remedying trouble on the telegraph line on petitioner's railroad between Leesville, Louisiana, and DeQuincy, Louisiana (33-34). Ellzey and the lineman traveled south from Leesville to DeQuincy on one of petitioner's passenger trains. The lineman had not discovered the cause of the trouble, when they reached DeQuincy, and consequently he and Ellzey stayed all night at DeQuincy (34-35). The next morning, the lineman secured a gasoline motor car, such as is used by employes of the railroad in traveling up and down the railroad track in the course of their work, and the lineman and Ellzey traveled north on this motor car to Singer, Louisiana, where the trouble was located and repaired by the lineman. They then proceeded north to Carson where some repairs were made to the motor car (144-146). The lineman's mission was accomplished, and he testified (144-159) that he wanted to leave the gasoline motor car at DeRidder, Louisiana, which was the first place north of Carson where the car could be kept in safety until placed on a train to be carried back to DeQuincy, but that Ellzey insisted that he run the car to Leesville, Louisiana, although they could have boarded the passenger train for Shreveport at DeRidder just as well as at Leesville. The lineman testified that Ellzey insisted that he operate the motor car to Leesville, and that he run it at a high rate of speed, in order to get there ahead of northbound passenger train No. 2, as shown by the following excerpts from his testimony:

"Q. What, if anything, did Mr. Ellzey say about the speed of the car from Carson on your trip North?
A. Well, 'Let her go. I have got to get to Leesville ahead of No. 2.'

* * * * * * * *

"Q. What did he say at the depot at Carson?
A. I was working on the switch board and I said something to Mr. Adams—I asked him if there was some place to get the motor car fixed at, and he said there was; and then he asked me where we were going, and Ellzey told him we were going to Leesville on the motor car and to Shreveport on No. 2. I says, 'I had about enough of that wild riding,' and he said, 'We will have some more of it if the damned thing stayed on the rail.'
"Q. Did you tell Mr. Ellzey, in the presence of Mr. Adams there at the station, where you wanted to stop?
A. I told him that I didn't think we could go to Leesville for No. 2.
"Q. Did you say anything about where you wanted to leave the motor car?
A. At DeRidder.

* * * * * * * *

"Q. Did you say anything to Ellzey about wanting to stop at DeRidder?
A. Yes, sir.
"Q. What did he say?
A. Said we were going into Leesville where we started.

* * * * * * * *

"Q. Did you tell Ellzey that you wanted to leave the car at DeRidder?
A. Yes, sir.
"Q. And he said what?
A. To go on to Leesville.

* * * * * * * *

"Q. State what, if anything, Mr. Ellzey said to you about the speed of the car after you left Carson?

A. Well, we had to go through a tunnel at DeRidder, and he says, 'We will have to run now'—And he stopped somewhere else at DeRidder and lost about four minutes; and he said, 'We sure enough will have to run now.'

"Q. Did Mr. Ellzey make any criticism or complaint with reference to the ability of the car to make speed?

A. Yes, sir.

"Q. State what those criticisms or complaints were?

A. 'What is the matter with the damned thing? It won't run any more.' When we started down the hill north of Ludington, he wanted to know what was the matter with the damned thing, it it would not run. One cylinder fell off (quit working) down the hill.

* * * * * * * *

"Q. At any time on the trip from DeRidder to Leesville, what, if anything, did Mr. Ellzey say to you, urging you to run the car faster?

* * * * * * * *

"A. He wanted to know what was the matter with the damned thing, it would not run any faster.

"Q. Weren't you running fast?

A. Yes, sir (146-150).

* * * * * * * *

"A. I suggested to Mr. Ellzey that we stop at DeRidder, and he said 'We will go to Leesville'" (156).

The lineman testified that he and Ellzey were 40 minutes ahead of passenger train No. 2, when they left Carson, and 17 minutes ahead of it when they left DeRidder, if it was running on time (157).

The lineman was instructed to go along with Ellzey, and to do as he said (158-159).

The lineman's testimony was corroborated by that of H. E. Adams (133-143), who, at the time of

the accident, was station agent at Carson, Louisiana. Adams said that he told Ellzey he did not think Ellzey and the lineman had time to go to Leesville ahead of No. 2, and that Ellzey replied that he would go if the motor car stayed on the track, and he would make it. Adams testified further that the lineman said that he was about through with his wild riding, but Ellzey replied that they would have some more of it if the damned thing stayed on the track. Adams also testified that Merchant wanted to leave the car at Carson, or at DeRidder, and Ellzey said he was going to Leesville ahead of No. 2 if it stayed on the track (135-137).

> "Q. Did Ellzey say or do anything that would indicate that he was in a hurry?
> A. Yes, sir; he wanted to go ahead of No. 2" (136).

It is not customary to carry passengers on hand cars (motor cars) (137).

Several witnesses testified that the motor car was running very fast, near the point of the accident (91, 95-97). D. M. Kimball saw Ellzey and Merchant leave DeQuincy on the morning of the accident, and heard W. M. James, section foreman, tell Merchant he had better not overspeed the motor car (103-105).

Ellzey denied urging Merchant to run the motor car faster, unless he did so while the car was disabled by having the gasoline feed pipe broken. This occurred when they had traveled some distance north of DeQuincy, and the brake was not repaired until they reached Carson (75). Ellzey stated that he believed

he cautioned Merchant to slow down while crossing switches in DeRidder, but that when the car was running fast, after leaving DeRidder, he made no complaint about the speed of the car (75). He also stated that they were in a hurry to catch a train to Shreveport, and that they just had 25 minutes to get to Leesville (80).

The circuit court of appeals in reversing the judgment in favor of defendants, on account of alleged error, in failing to instruct the jury on last clear chance, said:

> "The plaintiff complains of the refusal of the court to instruct the jury to find in his favor, and of instructions given by the court to the jury, including the following:
>
> If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." * * *
>
> "Under the above set out instruction to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care situated as he was would have realized that it was dangerous to remain in the car.

> Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury, and plaintiff's negligence be deemed a remote cause. *Chunn* v. *City & Suburban Railway*, 207 U. S. 302; 10 Corpus Juris, 1107. The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it" (241).

It is our position that the court of appeals erred in its decision because there was no pleading, and no proof before the jury, which would bring this case within the exception known as the last clear chance doctrine, and no occasion or justification for giving such an instruction to the jury.

Under the evidence above set forth the jury was justified in finding that Ellzey negligently ordered, encouraged or acquiesced in the running of the motor car at an excessive rate of speed, when he knew, or should have known, that it was dangerous to do so, and that his influence or attitude continued up to the moment of the accident. There was, on the other hand, no evidence upon which an instruction based on the last clear chance doctrine could have been given. There was no evidence that Ellzey had gotten into a situation of imminent peril, or into a trap from which he could not extricate himself, or that he had changed his attitude as to the speed of the car. In fact there was no evidence that there was any change in conditions until the accident actually happened, and there-

fore there was nothing to support the making of an exception based on the last clear chance doctrine. Our contention is, we submit, supported by the following authorities:

The court of appeals, and respondent, cite Section 1490, 10 Corpus Juris 1107; but there, after it is stated that

> The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well recognized rule that, if the negligence of the passenger is known to the employees of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause;

it is further stated that

> This rule applies *when, and only when, the carrier's opportunity of preventing the injury* by the exercise of due care *is later in point of time* than that of the passenger. Constructive knowledge on the part of the carrier gives rise to such opportunity where an employee of the carrier actually sees the passenger and the *passenger's situation is such as to indicate* to a man of ordinary prudence *that he is in danger of being injured*, or *where the passenger is in a situation of peril from which he cannot extricate himself and it is the duty of the carrier to keep a lookout*, but where there is not sufficient time after the discovery of plaintiff's peril for the employees of defend-

> ant to prevent the injury, there is no room for the application of the rule. There is authority, however, to the effect that it is a misuse of terms to speak of the passenger's conduct in such case as contributory negligence, and that the rule in question is but the statement in another form of the proposition that antecedent misconduct or negligence on the part of the passenger, *such as could not have had any influence on the conduct of the carrier,* will not defeat a recovery for injuries inflicted by the immediate negligence of the carrier. (All italics in this brief are ours.)
>
> See also, 29 Cyc. 530.

In the case of *St. Louis & San Francisco Ry. Co.* v. *Schumacher,* 152 U. S. 77, 81, the plaintiff, an employee, was riding in an improper place on a train. Some other cars were allowed to run down a grade and strike the portion of the train on which plaintiff was riding, causing him to be thrown off and injured. The court, in holding that plaintiff's contributory negligence barred his recovery, said:

> The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. *There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury.*

In the case of *Wheelock* v. *Clay,* 13 Fed. (2d) 972, 973, the circuit court of appeals, eighth circuit, stated the rule as follows:

The "last clear chance doctrine" presupposes negligence on the part of the defendant, and contributory negligence on the part of plaintiff (*A., T. & S. F. Ry. Co.* v. *Taylor*, (C. C. A. 8) 196 F. 878, 116 C. C. A. 440), and is an exception to the general rule making contributory negligence a defense (*Denver City Tramway Co.* v. *Cobb*, (C. C. A. 8) 164 F. 41, 90 C. C. A. 459). There are limitations, however, to the application of the doctrine.

In the case last cited, this court said:

> "First. *The exception does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury.*" *St. Louis & San Francisco Ry. Co.* v. *Schumacher*, 152 U. S. 77, 81, 14 S. Ct. 479, 38 L. Ed. 361; *Illinois Central R. Co.* v. *Ackerman*, 76 C. C. A. 13, 144 F. 959; *Missouri Pacific Ry. Co.* v. *Moseley*, 6 C. C. A. 641, 57 F. 921; *Gilbert* v. *Erie R. Co.*, 38 C. C. A. 408, 97 F. 747.

The court of appeals, in its decision in the present case, also cites, as an authority, the case of *Chunn* v. *City and Suburban Railway of Washington*, 207 U. S. 302. In that case, however, a person who intended to take passage on a street car had taken her position, as was customary, between two tracks over which the street cars were operated. While waiting for the car on which she intended to take passage, and just as her car was approaching, she was struck by a car going in the opposite direction on the adjacent track. At the moment of the accident the plaintiff was in a position between the two street cars from which it should have been evident to defendant's motorman that she could not extricate herself, and consequently her contribu-

tory negligence did not continue as an efficient cause up to the very moment of the accident. In this case, however, Ellzey had the opportunity, up to the moment of the accident, to countermand his request or command that Merchant run the car at a high rate of speed, or to protest against such fast running, and, as he failed to do so, his negligence continued as a contributing cause. Ellzey himself testifies that he made no complaint against running the car fast after it left DeRidder (75).

In the case of *St. Louis & S. F. R. Co.* v. *Summers*, 173 Fed. 359, the Circuit Court of Appeals, 8th Circuit, in discussing the *Chunn* case, said:

> This leaves for our consideration the sole question whether there was any evidence to support the finding necessarily made by the jury that defendant railroad company could, by the exercise of ordinary care, after discovering that the decedent was in a situation of peril and danger, have avoided injuring him. The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet *another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train or otherwise have avoided injuring him, and failed to do so. Chunn* v. *City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co.* v. *Cobb*, 164 Fed. 41, 90 C. C. A. 459. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence

> of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and *some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.*

There is, in the instant case, no evidence whatever that the lineman discovered that Ellzey was in imminent peril. There is no proof that any new act of negligence arose, but, according to the evidence, the same condition which had arisen, either through Ellzey's request or with his acquiescence, continued up to the very moment of the accident.

In the case of *Virginia Ry. & Power Co.* v. *Leland*, 143 Va. 920, 129 S. E. 760, the court stated the last clear chance rule as follows:

> "The foundation of the doctrine is that the parties are guilty of concurring negligence, and *there must be some condition, circumstance, or superadded fact which one of the parties saw, or by the exercise of ordinary care could have seen, that made it his duty to endeavor to avoid injury to the other negligent party, and the obligation of discovering the last clear chance is mutual.*"
>
> *Green* v. *Ruffin*, 141 Va. 628, 125 S. E. 747.
>
> *McNamara* v. *Rainey Luggage Corp., et al.*, 139 Va. 197, 123 S. E. 515.

> "One relying on the doctrine of the last clear chance has *the burden of proving affirmatively* by a preponderance of evidence that by the use of ordinary care after his peril was discovered there was in fact a clear chance to save him."
>
> *Washington & Old Dominion Railway* v. *Thompson*, 136 Va. 597, 118 S. E. 79.

Hendry v. *Virginia Railway & Power Co.*, 130 Va. 283, 107 S. E. 716.
Ashby v. *Virginia Railway & Power Co.*, 138 Va. 310, 122 S. E. 104.

Plaintiff's several petitions contained no allegation, and plaintiff offered no evidence, in support of the last clear chance theory. We feel justified in saying that such theory first came into the case when the court of appeals rendered its decision.

In the case of *Kinney* v. *Chicago Great Western R. Co.*, 17 Fed. (2d) 708, 709, the rule is stated in the following language:

> The "last clear chance" doctrine is one applied by courts as an exception to the defense of contributory negligence. It is to be invoked in cases where plaintiff has contributed to the negligence of the defendant, but in which case the defendant possessed the last opportunity of avoiding the injury, and further that the defendant knew of such.

In the case of *Gilbert* v. *Erie R. Co.*, 97 Fed. 747, the rule is stated, in the second syllabus, as follows:

> The rule that a plaintiff who, by his own negligence, placed himself in a dangerous position, where an injury was likely to result, may still recover for such injury where the defendant, with knowledge, or such notice as is equivalent to knowledge of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, has no application to a case where the injury was the result of the concurrent negligence of both parties.

See also:

Pennsylvania R. Co. v. *Swartzel*, 17 Fed. (2d) 869, 870.

Allnutt v. *Missouri Pacific R. Co.*, 8 Fed. (2d) 604, 606.
Robbins v. *Pennsylvania Co.*, 245 Fed. 435, 441.
Reaver v. *Walch*, 3 Fed. (2d) 204.

The rule as to last clear chance is the same in the State of Louisiana, where the accident happened.

In *Hammers* v. *Colorado Southern Ry. Co.*, 128 La., 648, the Supreme Court of Louisiana said:

> The last clear chance doctrine is not applicable where the negligence of plaintiff and defendant are concurrent and each continues to the very moment of the accident.

See also *Harrison* v. *Ry. Co.*, 132 La., 761; *Callery* v. *Railway Co.*, 139 La., 763; and *Castile* v. *O'Keefe*, 138 La., 479.

Plaintiff lays great stress upon the decision of the Court of Appeals of the 9th Circuit in *Weisshaar* v. *Kimball S. S. Co.*, 128 Fed. 397. In that case, suit was brought by Ella M. Weisshaar as administratrix, for the death of her husband, who was drowned by the capsizing of a small boat of the defendant steamship company. Defendant's steamship was anchored about a mile and a half from the shore, and passengers were to be taken from the shore to the steamship in the small boat, which was in charge of the second officer of the steamship. The boat capsized in going from the shore to the ship. The steamship company contended that deceased was negligent, because the boat was intended to contain only fourteen people, and eighteen persons crowded into it, with some additional luggage, and that this was done over the protest of the officer in command, which protest was heard by Weiss-

haar. The district court held that the deceased was guilty of contributory negligence and dismissed the plaintiff's petition. The court of appeals, however, held that the officer in command of the boat was negligent in permitting the boat to be overloaded, and that he was further negligent in continuing the journey after passing out of the smooth water into rough water. The principle applicable to the Weisshaar case is very different from the principle applicable to this Ellzey case. In the Weisshaar case, a boat intended for the carriage of passengers, was being used for that purpose at the time. It had an officer and crew in charge. Furthermore, when the passengers insisted on getting into the boat, the boat was then in still water, and the imminent peril to the passengers occurred when the boat approached the rough water. This new hazard imposed a new duty on the officer to turn back. In this Ellzey case, "the plaintiff's relation to the motor car and its operator was not that of an ordinary passenger" (R. 241), and there was no evidence of any change of conditions or hazards up to the moment of the accident. Another most important difference between the Weisshaar case and this Ellzey case is that in the Weisshaar case the district court held that the deceased was guilty of negligence as a matter of law; in this Ellzey case the question of plaintiff's contributory negligence was submitted to the jury.

2. Plaintiff made no objection to the instructions upon the ground on which the decision of the court of appeals is based, and the decision of the court of appeals is erroneous for that reason also.

This proposition has been discussed in petitioner's statement and brief, pages 14 to 20, and need not be further stated here.

3. The plaintiff had full opportunity to state his exceptions.

Plaintiff makes the statement several times in his brief that he was prevented from making detailed objections to the court's instruction because of protests made by the defendant and acquiesced in by the court (see for example page 5 of respondent's brief).

It appears from the record (182-199) that the court fully instructed the jury on the law of negligence and contributory negligence. There was nothing in this main instruction presenting the last clear chance theory. At the conclusion of this main charge the court asked counsel if there was "anything else" (199) and plaintiff's counsel thereupon made several objections to the charge, but made no objection to the failure of the court to submit the case on the last clear chance theory. After the jury had retired, it came back with a request for further instructions on the issue of contributory negligence. After the court had given such additional instructions, plaintiff's counsel made objections to the instruction as given, but without any request for the submission of the case on the last clear chance theory, and, in response to plaintiff's objections, the court endeavored to meet those objections. Plaintiff's counsel then raised the question as to whether defendant's answer had raised the issue of plaintiff's concurring in the negligent speed of the car, and after that question had been settled, plaintiff's counsel said to the court:

> "I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this" (269):

Counsel for defendant did not object to plaintiff's counsel stating his exceptions. What he did say was:

> "Your Honor, if counsel is going to make an *extended argument*, I don't think it is proper at this time" (269).

Respondent was represented by lawyers of large experience and ability, and of unquestionable courage, who would not have failed to insist on getting their exceptions fully in the record, if any exceptions, as distinguished from mere matters of argument, in addition to the exceptions they had already stated, had occurred to them. The record shows that the district court was patient, and willing to listen to any proper suggestions or exceptions. In such circumstances, there is no room for plaintiff's contention that he was prevented from making proper objections and exceptions to the instructions of the district court.

See also discussion on pages 14 to 20 of petitioner's original brief.

II.

ISSUES NOT RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

Plaintiff, after discussing the above matters, states (Brief, 16 *et seq.*) that if the court of appeals erred in the ruling upon which it reversed the case, there were other errors upon which the case should have been reversed, as pointed out in his assignment of errors before the court of appeals, and he contends that the case should be reversed on those grounds.

The other alleged errors complained of by plaintiff reduce themselves to the contentions that the court of appeals should have held that the district court erred in failing to give instructions charging the jury, in effect, as a matter of law: First, that plaintiff was a passenger; and second, that because he was a passenger his contributory negligence would not bar his right of recovery.

There is no merit in respondent's contentions for the following reasons:

(a) **There was no error or prejudice to the plaintiff in the ruling of the court of appeals that the question of plaintiff's status as passenger, or otherwise, was properly left to the jury.**

The plaintiff was a guard employed generally to protect the employees and property of the defendant from violence, and detailed at this particular time to protect defendant's lineman while he was engaged in

repairing its telegraph lines. For the convenience of the lineman, and himself, they took a small railroad motor car to carry them in search of the defect in the telegraph lines. This car was intended solely for the conveyance of employees, and not for the conveyance of passengers, and this must have been known to the plaintiff at the time. In permitting the lineman to select this vehicle, and in using it with him, plaintiff did not put himself in the position of a passenger, but became a joint user thereof, with the rights and obligations incident to such use. There was also the question whether Ellzey was anything more than a trespasser in continuing on the motor car beyond DeRidder. The court of appeals was therefore right in its statement that:

> "The plaintiff's relation to the motor car and its operator was not that of an ordinary passenger. He was a public official performing a duty to which he was assigned. That circumstance was proper to be considered in determining whether plaintiff did, or did not, have such control as resulted in his conduct being a direct and efficient cause of the peril which resulted in his injury. Under the evidence adduced it was a question for the jury whether the plaintiff did or did not directly contribute to the injury complained of. It follows that the court did not err in refusing to direct a verdict in his favor" (241).

The plaintiff did not come within the definition of a passenger, which is stated by a standard authority as follows:

> "The relation of carrier and passenger is dependent on the existence of a contract of carriage, express or implied, between the carrier and the

> passenger, made either by themselves or by their respective agents. It is the existence of such a contract which distinguishes a passenger from a licensee, a trespasser, an employee of the carrier, an employee of a sleeping car company, and other persons riding in the carrier's vehicles'' (10 C. J. 611).

Furthermore, the plaintiff is in no position to complain on this question for the district court told the jury that if the lineman and plaintiff were properly using the car at the time of the accident, the plaintiff was a passenger (188) and that the defendant owed him the duty to exercise a high degree of care for his safety (191). This instruction being all that the plaintiff asked in that regard, and more than he was entitled to, he has no ground of objection (*Chicago etc. Co.* v. *Ward*, 252 U. S. 18, 23; 40 S. C. R. 275).

(b) Even if plaintiff were a passenger his contributory negligence would bar his right of recovery.

The rule imposing a high degree of care upon a carrier of passengers is based on substantial reasons, the principal one of them being that the carrier operates and maintains the facilities of transportation, and is familiar therewith, while the passenger ordinarily has no opportunity to inspect the facilities or control their operation. For this same reason the passenger, not having reasonable opportunity to inspect or control the facilities, is not negligent if he fails to do so. But, as the reason changes, the rule also changes. For example, a passenger who is injured by the negligence of the carrier due to a defect or misconduct which the passenger, in the exercise of due

care, should have guarded against, the passenger's contributory negligence is a defense.

In *Elder Dempster Shipping Company* v. *Pouppirt*, 125 Fed. 732, 738, it was held that where a passenger voluntarily left a place of safety on a ship and went to a more hazardous place where repairs were being made, and was injured as a result of a risk which, in the exercise of due care, he should have avoided, he was not entitled to recover. In its opinion the court said, in part:

> In *Ingalls* v. *Bills*, 9 Metc. (Mass.) 7, 43 Am. Dec. 346, the court, after stating the law with regard to carriers of goods, says:
>
> > "But in regard to the carriage of passengers the same principles of law have not been applied, and for the obvious reason that a great distinction exists between persons and goods; the passengers being able to take care of themselves and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do, who have intrusted them to others."

In *Mendelson* v. *Davis*, 281 Fed. 18, 22, plaintiff sued for injuries sustained from being thrown off of a train by reason of a vestibule door being left open. On appeal from a judgment against him plaintiff complained that the trial court erred in refusing to instruct the jury that "a passenger does not assume acts of negligence on the part of carrier's servants." The court of appeals held that this instruction was not warranted on the facts in the case, "* * * for, if the trap-door was open, when plaintiff first passed through the vestibule and saw it, or if it was ob-

vious, and he assumed to cross, he assumed the risk."

In *John J. Radel Co.* v. *Borches,* 147 Ky. 506, 145 S. W. 155, it was held that if the driver of a carriage in which a plaintiff was riding left the carriage and horses unattended, at the invitation or request of the plaintiff, or at the request or invitation of any of its passengers, in the presence of and without objection by the plaintiff, the plaintiff could not complain of injuries resulting from the horses running away.

In the case of *Monongahela River etc. Co.* v. *Schinnerer,* 196 Fed. 375, 382, the court said:

> * * * where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, is regarded as the negligence of all. *Railroad Co.* v. *Kistler,* 66 Ohio St. 326, 343, 64 N. E. 130. And guests and passengers cannot be relieved of a charge of negligence from the mere fact of such relation, when the appearances or circumstances coming to their notice were such as to indicate danger and to give opportunity to avert it by timely warning or active effort on their part. *Davis* v. *C., R. I. & P. R. Co.,* (C. C. A. 8) 159 Fed. 10, 18, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; *Brommer* v. *Pennsylvania Co.,* (C. C. A. 3) 179 Fed. 577, 581, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Brickell* v. *Railway Co.,* 120 N. Y. 290, 293; 24 N. E. 449, 17 Am. St. Rep. 648.

In *Winston's Administrator* v. *City of Henderson,* 179 Ky. 220, it was held that a passenger in an automobile may not recover damages for injuries sustained by reason of the negligence of an intoxicated driver, whose condition was known to the passenger. The court said:

> One about to enter a car should exercise reasonable care to see that the driver in charge is an experienced, reasonably safe and sober person.

The court further said:

> When two or more persons voluntarily drive or ride an automobile upon a public highway at a dangerously high rate of speed merely for the purpose of enjoying the exhilarating and pleasurable sensations incident to the swirl and dash of rapid transit, they * * * assume the risks of danger attendant upon the sudden and violent movements of the car * * *.

In *Webber* v. *Billings,* 184 Mich. 119, 150 N. W. 332, 334, plaintiff, with five other young men, hired a seven-passenger automobile to go from Ishpeming to Marquette, in Michigan, and on their arrival at Marquette they all, including the driver, partook more or less of intoxicating liquor. Later the party was increased to twelve persons in the car, and during the use of the car it capsized and the plaintiff was injured, and recovered a judgment in the trial court for his injuries. From this judgment an appeal was taken on the ground, among others, that the plaintiff was guilty of negligence as a matter of law. The supreme court held that the question of plaintiff's contributory negligence had been fairly submitted to the jury and the issues thereunder found in favor of the plaintiff. The court said, however:

> "He seems to have imbibed intoxicating liquors with the others and to have undertaken the journey without protesting either as to the overcrowding of the car or as to the alleged excessive rate of speed at which it was driven. It is, of course,

> elementary that, when seeking to recover damages for injuries caused by the negligent act of another, the plaintiff must show himself free from negligence causing or contributing to his injury. If it can be said in the present instance that the plaintiff acquiesced or participated in the negligence of the driver, he should not be permitted to recover."

See also, *Jefson* (*Jepson*) v. *Crosstown St. Ry. Co.*, 72 Misc. 103, 107, 129 N. Y. Sup. 233, wherein it was held that where a person riding in an automobile which was being driven at a high rate of speed was injured when the automobile collided with an obstruction negligently left in the street, he was not entitled to recover. The court said:

> "The mere fact that the plaintiff rode in the automobile 1500 feet, from Delavan Street to Jefferson Street, in something like 20 seconds, without remonstrance or even a suggestion to the driver that he stop the car or slacken its speed, places on the plaintiff all the recklessness or contributory negligence needed to sustain a finding of the jury that he was in an unreasonable use of the highway; and his failure to attempt to restrain the driver from pursuing such a madcap pace would warrant the jury in finding complete acquiescence on his part in the driver's negligence and carelessness, and render him answerable therefor."

The courts have also held that where a passenger falls over an obstruction in the aisle of a car, which he might have seen and avoided by the exercise of ordinary care (*Abernathy* v. *Lusk*, Mo. App., 182 S. W. 1049), or fails to use due care when riding on a freight train (*Harris* v. *Hannibal etc., Co.*, 89 Mo. 233),

or on a crowded train (*Norvell* v. *Kanawha etc., Co.*, 67 W. Va. 467), his contributory negligence may be a defense.

The general rule as to the duty of a passenger to use due care for his own protection is thus stated in 10 C. J. 1096-1097:

> "A passenger must exercise ordinary care, and such care only, for his own safety, that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances; and it is a well established rule, that, although there has been negligence on the part of the carrier contributing to the injuries, if the passenger fails to exercise ordinary care, and his failure is proximately connected with his injuries, he is guilty of contributory negligence which will defeat a recovery."

There is no merit in plaintiff's contention that a passenger cannot be held guilty of negligence unless he actually knew of the danger, as distinguished from what should have been observed by a person of ordinary prudence, situated as he was. If it should have been apparent to a reasonably prudent person, having the knowledge which plaintiff had, that it was dangerous to operate the motor car at a high rate of speed, as submitted by the district court (193, 201, 205), then even if he had been a passenger, the jury would have been justified in finding him negligent if he encouraged or acquiesced in the operation of the car at such dangerous rate of speed.

> The law requires a person to make reasonable use of his faculties to observe and avoid danger, and conclusively presumes that he knows

what he would have known had he made ordinary use of his senses (*DeHoney* v. *Harding,* 300 Fed. 696, 699).

In *Union Traction Company* v. *Sullivan,* 38 Ind. App. 513, 76 N. E. 116, 119, with regard to a passenger, the court said:

> "* * * if appellee knowingly exposed himself to danger such as an ordinarily prudent person under the circumstances would not have done, and was thereby injured, or if by reasonable precaution he could have foreseen the danger and avoided the injury, he ought not to be allowed damages."

In *United R. & E. Co.* v. *Riley,* 109 Md. 327, 71 Atl. 970, 974, the court said, of a passenger:

> "He should not be required to predicate danger, unless there was something in the situation known to him, or which he could have known by the exercise of reasonable care, from which he was or ought to have been warned of his peril."

Furthermore, the plaintiff is in no position to make complaint on this point for the reason that he recognized and accepted the correctness of this rule in the trial of the case. In his exception to the charge of the court on the issue of contributory negligence plaintiff's counsel said:

> "The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed" (200).

This language was repeated by plaintiff in his formal exceptions to the charge to the jury (214).

For all the reasons stated it is submitted that the judgment of the circuit court of appeals should be reversed, and the judgment of the district court affirmed.

Respectfully submitted,

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No. 1[redacted] 63

IN THE SUPREME COURT OF THE UNITED STATES

KANSAS CITY SOUTHERN RAILWAY COMPANY

PETITIONER

—VS.—

R. E. ELLZEY

RESPONDENT

ANSWER TO PETITON FOR CERTIORARI

S. P. JONES,
Marshall, Texas
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CLARK & VAN HOOK,
Shreveport, Louisiana;
Attorneys for Respondent

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S. P. JONES,
Marshall, Texas,
Attorney for Respondent

I

The plaintiff in error asks for the extraordinary writ of certiorari, on what it claims to be an erorr of procedure by the Circuit Court of Appeals, and which error, if any, does not appear in the opinion rendered by that court,—the petition should be denied.

II

There is no merit in the contention of the plaintiff in error that the United States Circuit Court of Appeals has, in this case, repudiated or ignored any substantial rule of procedure or settled doctrine of procedure, as will very fully appear from a casual examination of the record in the case.

Nothing in the opinion in this case remotely indicates that the Circuit Court of Appeals has upset precedents or ruled differently to the established usages of the Federal Appellate Courts. The fact that the petition for certiorari points out no error discoverable by reading the opinion of the Circuit Court of Appeals discloses that it is not necessary to grant the writ in order to secure uniformity of decisions; likewise, that no error of such gravity and importance has been committed as will justify the writ.

In Re: Woods, Petitioner, 143 U. S. 202.

This, the leading case, announces the doctrine in substance that this extraordinary writ will only be granted when questions of gravity and importance are involved. That case also calls attention to the fact that it has long been the purpose of Legislation to relieve the United States Supreme Court of the excessive burden of general litigation, and that only when questions of gravity and importance are involved or when it is deemed necessary to maintain uniformity of decisions, should the Supreme Court resort to the extraordinary remedy of granting a writ of certiorari.

The plaintiff in error, after presenting fifty pages of printed argument, concludes the same by citing the case of American Construction Co., vs. Jacksonville, Tampa & Key West Railway Co., 148 U. S. 372 and quoting therefrom, showing that the Supreme Court of the United States holds that this extraordinary remedy should be sparingly exercised—and only in cases of gravity and importance, or in order to secure uniformity of decisions.

It is confidently believed that an examination of the record will disclose that there is no merit in the contention that by a careful examination of the entire record, it will appear that the Circuit Court of Appeals has considered errors committed by the trial court which were not properly preserved by exception.

The respondent—plaintiff in the lower court—contended there and has contended since—that under the peculiar facts and circumstances of this case, that the Railroad Company was liable to him and that he was entitled to a peremptory charge to that effect. Certainly that he was entitled to try his own case on the theory that if he had been guilty of negligence, that the subsequent negligence of Merchant caused the injury, or at least, that it was a question of fact for the determination of the jury, and which fact, the trial court had withdrawn from the consideration of the jury. The plaintiff below—respondent here—contended in the trial court that the doctrine announced in Weishaar vs. Kimble S. S. Co., 128 Fed. 597, 63 C. C. A. 139, was appricable for it does not appear in this case that the man Merchant so much as made a milk and water protest against the fact running which he claims Ellzey had encouraged.

We seriously contend that there is no merit in the petition for certiorari, and that it should be in all things denied.

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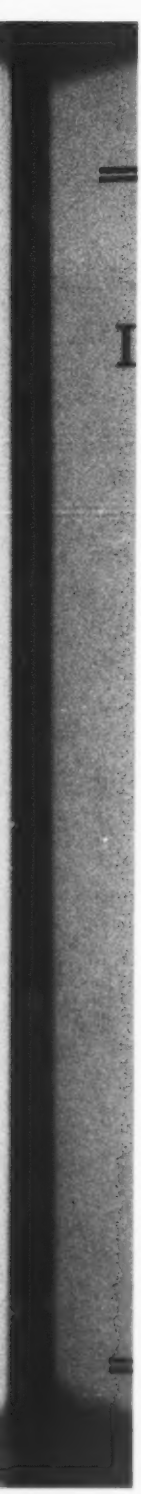

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Number [redacted] 63

In the Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner

vs.

R. E. ELLZEY, Respondent

STATEMENT AND BRIEF OF RESPONDENT

S. P. JONES, Marshall, Texas,
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Number 369

In the Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner

vs.

R. E. ELLZEY, Respondent

STATEMENT AND BRIEF OF RESPONDENT

S. P. JONES, Marshall, Texas,
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SYNOPSIS

Ellzey, a Deputy U. S. Marshal, a passenger for hire, while guarding the driver of a motor car during the general shopmen's

strike of July, 1922, was injured by the car being driven at a negligent rate of speed.

The trial court instructed the jury in substance that Ellzey would be guilty of contributory negligence if he directed, encouraged or acquiesced in the fast speed. The plaintiff objected to this presentation of the case, and requested the court to give a peremptory charge for plaintiff—Record 206-207. The court refusing to direct a verdict for plaintiff, he requested a charge eliminating the question of contributory negligence, by instructing the jury that if the driver was acting within the scope of his authority, to find for the plaintiff,—this being refused, the plaintiff insisted that Ellzey being a passenger, would not be guilty of contributory negligence in urging or encouraging fast speed, unless he *knew* that his safety was endangered.

The trial court instructed the jury that he would be guilty of contributory negligence if a reasonable man would have acted differently. The plaintiff insisted that a passenger, as Ellzey was, would not be guilty of contributory negligence unless he had actual knowledge that he was encouraging a rate of speed that endangered his safety.

These matters were raised by special charges, and objections and exceptions to the Court's Charge.

The jury retired to consider their verdict, and later returned into court, and asked what would constitute contributory negligence on the part of the plaintiff. The court told them in substance that if the plaintiff acquiesced in fast running, he would be guilty of contributory negligence, and did not explain that if the driver with knowledge of such conduct on the part of the plaintiff, thereafter negligently caused the injury, that the jury might find plaintiff's negligence to be the remote, and the driver's negligence the direct or sole cause of the wreck, and thereby acquit the passenger of contributory negligence.

The plaintiff objected to this charge, but was not given (in

fact was denied) opportunity to explain his reasons for objecting to it,—in that the defendant protested against plaintiff being permitted to state his objections, and the court acquiesced in the position taken by the defendant, and declined to permit the plaintiff to make full objections.

The Circuit Court of Appeals reversed the case because—the court erred in giving the charge on contributory negligence, which dircted the jury to find plaintiff guilty of contributory negligence if he acquiesced in fast speed, though such negligence may have been remote, and the subsequent negligence of the driver, the direct or sole cause of the wreck.

GENERAL STATEMENT

The respondent will be referred to in this brief as plaintiff, and the petitioner as defendent.

The plaintiff, referring to the statement of the case in the brief of the defendent, calls attention to the following additional contentions made by the plaintiff, viz:

The plaintiff was a passenger for hire.

The uncontroverted evidence showed that the wreck was caused by the car being operated at a high and reckless rate of speed.

The charge of the court as a whole was to the effect that if plaintiff encouraged, or acquiesced in the fast operation of the car, he was guilty of contributory negligence; and did not make knowledge on his part of the danger a test as to his contributory negligence, and did not relieve him of negligence, if he did not in fact know that it was dangerous.

The plaintiff contended, and still contends that the trial court should have directed a verdict for plaintiff (Weisshaar vs. Kimball F. S. Co., 128 Fed. 597; 63 C. C. 139) and after answering defendant's assignments of error, will present more fully his reasons for that contention.

ANSWER TO DEFENDANT'S BRIEF AND ASSIGNMENTS

If this court should conclude that the point on which the case was reversed was not raised by the exceptions to the charge, nevertheless the reversal should be sustained on account of other errors properly complained of in our brief in the Circuit Court of Appeals, which will be presented in this case after our answer to the brief of the defendant.

The charge of the court on contributory negligence was an incorrect statement of the law,—of such character as to result in injury to the plaintiff.

Defendant's First Assignment of Error presents the contention that the portion of the charge quoted in the opinion of the Circuit Court of Appeals as the basis for reversal of this case, correctly announced the law; but it fails to present any applicable authorities, and practically abandons that theory, and endeavors to show that the charge of the court on contributory negligence taken as a whole was correct, and that if the charge on contributory negligence was incorrect, that no sufficient exception was reserved by the plaintiff.

The defendant contends that the Circuit Court of Appeals erred in holding:

1. That the charge referred to by it erroneously stated the law.
2. That the said charge should have been considered in connection with the whole charge, and when so considered, was not erroneous.
3. That the plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that particular charge.

The plaintiff contends that under the circumstances, the particular charge having been given in response

to a request of the jury for a statement of the law, as to when plaintiff would be guilty of contributory negligence, that it should stand or fall as a concrete charge on the subject unaided by the main charge given orally, and which the jury clearly had forgotten, or did not understand.

The plaintiff made objection to the particular charge, and was prevented from stating detailed objections by protests made by defendant, and acquiesced in by the court (Record 206), and saved his exception under an assurance of the court, that he would be allowed his exceptions to the charge. (Record 206).

It is believed that while the passenger in some situations may be guilty of contributory negligence, in doing or failing to do what a reasonably prudent person would or would not have done; that as to acquiescing, advising or encouraging in, or asking for fast speed, his conduct must be based on a *knowledge* of danger in order to constitute contributory negigence. If it were otherwise, the mere suggestion of the impatient passenger that the carrier was not getting him over the road fast enough, would raise the issue of the passenger's contributory negligence barring a recovery caused by negligent speed.

Referring to the authorities cited under defendant's First Assignment of Error, we merely direct the attention of this court to the fact that the Harding case (Wis.) was a suit by a gratuitous guest who being equally responsible for the negligence, was not permitted to recover from his host.

The other cases are those in which the joint negligence of one in a carriage with that of the driver is a bar to a recovery against a third party.

No case has been cited, nor do we expect any well considered

case to be referred to, which holds that the negligence of the driver is imputable to the passenger for hire, in a suit by the passenger against the carrier. Conduct, if any, which would relieve the carrier of negligent operation, must be such as practically wrests from the carrier, the control of the vehicle.

Certainly there can be no implied negligence by reason of an acquiescence in reckless speed, unless it is based upon actual knowledge of danger by the passenger, and a failure to avail himself of an opportunity to abandon the vehicle.

A passenger for hire, as was the plaintiff, can not be held guilty of contributory negligence, as to the speed of the vehicle, unless he knows that his safety is in danger, and has an opportunity to avoid it. In other words, the question of what a reasonable prudent person would have done can not be made a test, and in all cases, though the passenger may be negligent, it is the duty of the carrier to protect him against such negligence. Therefore, the failure to discharge that obligation of protecting the passenger against his negligence, may become the immediate or sole cause of his injury, and the negligence of the passenger, the remote cause thereof.

We agree to, in fact we invoke, the doctrine that the charge must be considered as a whole, and that language inadvertently used will not control. Defendant contends that if the charge contains any language correctly stating the law, that such language controls. We contend that where the entire context conveys to the jury an erroneous view of the law by prescribing the wrong rule; that inadvertent language correctly stating the law, but not used in a way to clearly submit the rights of the parties does not relieve the charge of its vice—that is to say, that correct language used in an inadvertent way no more cures the vice of a charge erroneous when considered as a whole, than does incorrect language inadvertently used destroy the charge which is correct when considered as a whole.

The charge when fairly considered in the connection and

under the circumstances, gave an incorrect presentation of contributory negligence, and it can not be cured by the inadvertent use of a sentence favorable to the plaintiff; you can not change a gourd blossom to a rose by the use of a few drops of perfume.

The Circuit Court of Appeals correctly held that the charge on contributory negligence was erroneous.

Exceptions were reserved by the plaintiff to the charge on contributory negligence, and to the particular charge referred to in the opinion of the Circuit Court of Appeals (R-205-206).

A more detailed statement of the grounds of objections to the charge referred to, was prevented by counsel for defendant, acquiesced in by the trial court. (R-206).

The plaintiff excepted to the objectionable charge, and offered to state his objection to this charge given in response to the request of the jury for a definition of contributory negligence, and was prevented from doing so by the court at the request of the defendant. The defendant should not now be permitted to contend that plaintiff would not have urged the specific exception, or objection, that the charge authorized the jury to convict plaintiff of contributory negligence barring his recovery, though they might find that such negligence was a remote, and not the proximate cause of the wreck.

We shall not attempt to discuss the authorities relied upon by the defendant as to the necessity for exceptions to the charge to be taken, further than to call attention of this court to the fact that they recognize the rule that a party is only cut off from the right to urge objections to charges erroneously stating the law, where such party is given "full opportunty" to except to the charge. Thus in Norfolk Ry. Co. vs. Earnest, 229 U. S. 114, it is said:

> "The record discloses that full opportunty for presenting objections was afforded, and that the one now pointed out was not made."

Boyett vs. U. S. 271, U. S. 104:

"With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor."

We feel it unnecessary to cite other authorities to sustain our contention that inasmuch as the defendant aided in preventing us from having full opportunity to point out the particular vice of the charge given in response to the jury's request, that the defendant can not now complain that we failed to do the very thing it aided in preventing us from having an opportunity to do, than those above referred to, taken from the authorities relied upon by the defendant in support of its contention, that timely objection must be made to the court's charge. We consider that the defendant has selected the strongest cases. We know that common fairness demands the enforcement of the rule that a party is not denied his right to except to objectionable charges, where through no fault of his, he is not given opportunity in the trial court to present his objection.

We again call attention to the fact that the courts in denying the right to urge objections on appeal have usually based it on the additional fact that the error was probably harmless, and that the language was inadvertently used, as well as the failure of the party complaining to specifically point it out in the lower court.

We have stated in another portion of this brief that we subscribed to the rule that the charge on any subject must be considered as a whole in an effort to ascertain the view the jury probably took of the same, considering the language used; and to this we add, 'under the circumstances of the situation.' We find no fault with the authorities relied upon by the defendant, to support the contention that the charge must be so viewed, and that seasonable objections must be taken, provided a fair opportunity to make such objections is given. But the rules of common fairness should not be lost sight of, and we believe that when the jury came into court, and requested the court to tell them the circumstances under which the plaintiff would be guilty

of contributory negligence, and the court undertook to comply with that request, it then devolved upon the court to give a full and complete charge upon contributory negligence. The Court undertook to do this, giving a charge which was understood to be, accepted by the jury as their complete guide on that question. The court in discharging this duty, gave a charge on contributory negligence, which is clear and unambiguous, but very erroneously states the test, and fails to tell the jury that if the negligence, if any of plaintiff, was the remote or not the proximate cause of the injury, and the negligence of the defendant was the sole cause of the injury, that it would not constitute contributory negligence, and therefore would be no bar to his recovery. The plaintiff made an objection to the charge first given in response to the request of the jury, and the court undertook to clear up the objection as he viewed it, but instead of doing so, committed the graver error of telling the jury that plaintiff would be guilty of contributory negligence by acquiescing in fast speed, without removing himself from the car at the "earliest possible moment," and did not tell the jury that in order to convict him of contributory negligence, they must find that he appreciated the fact that such fast speed endangered his safety, and did not tell the jury that if the defendant had an opportunity to have prevented the injury by the use of proper care, that the plaintiff's negligence would be considered the remote, and the defendant's negligence the proximate cause of the injury. The plaintiff made objection to this charge, and was prevented from giving details—in other words, he was not given full opportunity to except to the charge, and point out its deficiencies. Surely he was not required to get into an unseemly controversy with the court, in the presence of the jury, as to his right to except to the charge—in fact, the court and counsel for the defendant took full responsibility—counsel for defendant by objecting to the plaintiff being permitted to state his exceptions, and the court by acquiescing in the objection of such—and the court saying that the plaintiff's rights would be protected by a bill.

In considering the question of whether the charge on contributory negligence was error, and the bearing special charges requested by plaintiff, and given, should have upon the review of the errors complained of, it is not only important, but necessary to take into consideration the special charges requested, and refused, and the order in which they were so requested, for each and all of the special charges requested by the plaintiff were offered only in the event the ones preceding same were refused.

The defendant contends that the erroneous charge on contributory negligence, for which the Circuit Court of Appeals reversed the case, presents the same principle that was suggested in plaintiff's requested charge No. 3—which the court refused to give, and which is as follows:

> "Again you are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. * * * It was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence." (Defendant's brief, page 16).

The charge so requested by the plaintiff, and refused by the court is so nearly the antithesis of the charge on contributory negligence given by the court, after the jury had requested a definition of contributory negligence, that we shall decline to dis-

cuss the same further, than to say that we think the comparison made by the defendant must have been through inadvertence.

The supplemental charge given by the court on contributory negligence, (R-203-206) should be treated as the entire charge on contributory negligence—in fact, the last sentence thereof, and being the portion upon which the Circuit Court of Appeals based its opinion reversing the case, should be treated as the sole charge on contributory negligence.

The whole charge of the court was verbal or oral (R-213).

The oral charge was somewhat long and tedious, making up pages 182 to 203 of the record, and those portions defining contributory negligence were somewhat involved and contradictory. The jury having considered the case, and apparently concluded that plaintiff's injury was caused by negligence on the part of the defendant, and not being able to remember charge on contributory negligence, returned into open court, and made the following request: (R-203)

"We want to know what would constitute contributory negligence on the part of the plaintiff."

This was no request for elucidation or explanation, but for full instruction on that subject. The court then gave a supplemental instruction on contributory negligence (R-203-204) the substance of which was (R-204) that if the defendant was negligent, but—

> "notwithstanding such negligence, the plaintiff himself participated in counseling, directing or encouraged in such negligence or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery."

To the giving of this charge, the plaintiff then and there objected, because it did not limit conduct that would convict the plaintiff of contributory negligence to negligent conduct, etc. (R-205).

The said objection among other things being (R-205):

> "That conduct upon his part, to constitute contributory

negligence, must have been such that he knew endangered his safety; and to that extent we except to the new definition of contributory negligence."

The court then attempted to elucidate more clearly his position, but not to comply with the objection, and emphasized his contention that it was not necessary for the plaintiff to know or appreciate that his conduct, or that of the driver of the car endangered his safety in order to convict him of contributory negligence but to put it upon the basis of whether a reasonably prudent person would have anticipated or appreciated the danger—a theory contrary to the exception that we had reserved, which exception and our theory was based upon the fact that the plaintiff was a passenger. Then, the court bringing his theory down to the particular case, and as the last sentence uttered by the court to the jury as the compact statement of the circumstances under which the plaintiff would be guilty of contributory negligence, erroneously charged the jury without limitation as follows:

"In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car (plaintiff) was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence. I think that covers it." (R-205-206).

The plaintiff then and there objected to this new charge, and started to give his reasons for his objections thereto, when the attorney for defendant protested against elucidation, and the

court acquiesced in the position taken by the defendant, saying: (R-206)

"Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill."

Again the court said:

"The plaintiff excepts to the instruction. All right, gentlemen, you may retire." (R-206)

Thus, we see that the court in the supplemental charge directed the jury to convict the plaintiff of contributory negligence if he did anything that contributed to bring about the wreck, regardless of whether it amounted to negligence upon his part, at least he failed to limit conduct on the part of the plaintiff, which would bar a recovery to negligent conduct.

The plaintiff excepted to this charge, and asked the court to clear up the error thus committed, and the court committed the greater error of giving the charge quoted in the opinion of the Circuit Court of Appeals, telling the jury that if the plaintiff acquiesced in the fast running, etc,., that he would be guilty of contributory negligence (R-205-206). The plaintiff asked for bread, and was hit in the solar plexus with a stone.

It is our contention that inasmuch as the plaintiff was a passenger, the harsh rule or doctrine of contributory negligence could not be involked to defeat his rights growing out of the defendant's negligence, unless the pasenger knew or appreciated the danger arising to him therefrom, in respect to the management and speed of the car. In other words that it was not dependent upon what a reasonably prudent, or reasonably careful person would have known and appreciated under the particular circumstances, which the court made the test by the use of the following language: (R-205)

"In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could have reasonably expected such a re-

sult to flow from the course which he had pursued, or he must have omitted to do something which a reasonable man, under the same circumstances would have done in order to avoid the injury."

The language above quoted was used by the trial court immediately preceding that portion of the charge quoted by the Circuit Court of Appeals, as the basis for reversing this case, and it will be readily seen that the trial court did not *inadvertently* use the incorrect language, but incorrectly announced the law in that charge, because he directs the attention of the jury to the fact that it is the last word on the subject. The court saying:

> "In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff urged, directed or counselled the driver of the car to run it at a reckless and high rate of speed, etc . . . "

thereby emphasizing the court's theory that the plaintiff would be guilty of contributory negligence, by acquiescing in or encouraging the speed, regardless of whether he knew or appreciated that it was dangerous.

It is believed that the rule to the effect that objections not urged at the trial, are considered waived, is intended to apply in those cases, where the trial court is not appraised that the charge is objectionable, and when and where the party is given a fair opportunity to present his objections thereto, and does not apply where the court is appraised of the objections urged, or aids in preventing the party from fully stating his reasons for exceptions taken. The authorities appear to be conclusive that the party must be given "*full opportunity*" to object, or he will not be cut off.

In this case the plaintiff had made his position known by special charges requested, and exceptions reserved each,—and all of which pointed out the vice in the charge as given,—unless there was a failure to fully object to the last sentence of the court's supplemental charge,—which we dispute,—and if there was a failure to fully object to that sentence of the supplemental charge,

—the last word of the court on the question of contributory negligence, such failure was due to the interference of the defendant, acquiesced in by the court, by which the plaintiff was prevented from fully stating his objections. He was not given *full opportunity* to object.

Under such circumstances, the Circuit Court of Appeals correctly reversed the case on account of the errors committed by the trial court.

In addition to the cases cited by the Circuit Court of Appeals, we cite the following authorities sustaining our contention that if Ellzey was guilty of contributory negligence in urging or acquiescing in fast running, Merchant knew it, and had opportunity to protect Ellzey against such negligence, and it was his duty to do so,—so we call attention to *Inland Sea Board Coasting Company vs. Tolson*, 139 U. S. 558.

Chunn vs. Washington City Ry. Co., 207 U. S. 302.

Pennsylvania Railway vs. Reed, 60 Fed. 964; 9 C. C. A. 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 *Fed.* 4; 112 *C.* C. A. 583.

10 *Corpus Juris, Section* 1400, page 1107; 6 CYC 631.

It seems to us that there can be no doubt that the plaintiff was injured by the vice in the charge on contributory negligence, pointed out by the Circuit Court of Appeals, and that under the circumstances—in view of the court failing to give, in fact refusing the plaintiff full opportunity to object in detail to the charge, that the Circuit Court of Appeals correctly disposed of this case.

Again we call attention to the fact that the plaintiff did all that he could to present his objections, and that he was prevented from doing so by the defendent urging the court to decline to hear the plaintiff's objections, and that therefore the defendant is in no position to now urge that the plaintiff failed to present detailed objections to said charge.

We feel certain that the Circuit Court of Appeals correctly

held that the trial court committed substantial error against the plaintiff in failing to permit a recovery for him, if he was guilty of negligence in urging or acquiescing in the high speed of the car, but that his negligence was the remote cause of the wreck, and that the subsequent negligence of the carrier in the operation of the car, was the sole or direct cause of the wreck. However, it is believed that regardless of our contention that the Circuit Court of Appeals properly reversed the case on account of the specific errors pointed out in its opinion, that there are many other errors for which the case should have been reversed, and which are pointed out in our assignments of error fully presented in our brief in the Circuit Court of Appeals, and which assignments of error are copied as Appendix A to this brief, and will now be discussed.

OTHER ERRORS FOR WHICH CASE SHOULD BE REVERSED

We direct the attention of this court to the fact that there were other errors for which the Circuit Court of Appeals should have reversed the case, which were duly presented in that court, and for the commission of which this court should reverse the case. These errors were pointed out in the trial court by special charges requested, and exceptions to the charge as given, and to aid the court in understanding the same, we make the following synopsis, and summary before presenting the propositions based upon assignments of error, filed with our petition for writ of error, in the trial court:

R. E. Ellzey, a United States Deputy Marshall in pay of the Government, while on a motor car at the request of the defendant to guard the operator against threatened personal violence during the general shopmen's strike of July, 1922, was injured, by negligent speed.

The defendant alleged the driver was not acting within the scope of his employment, but there was no evidence to raise that issue. It alleged reckless speed, but that Ellzey acquiesced in,

or encouraged it. The proof showed reckless speed caused the wreck, but raised no issue of Ellzey taking control, and barely raised the issue of him advising it. It is believed there was no evidence of his knowledge of danger—no evidence that the operator seriously objected, or was coerced. The court ruled in effect that if Ellzey acquiesced in the speed, he was guilty of contributory negligence. This mis-statement of the law was excepted to, and special charges requested by plaintiff presenting what we believe to be the correct rule.

The driver testified unqualifiedly that he had the right to make the trip in the car (R-151-2). He was not contradicted.

The suggestion that he had had enough wild riding did not amount to a protest, much less show a yielding to force. Ellzey being a passenger for hire, the carrier owed him a very high degree of care, and could not directly or impliedly contract against its negligence.

It was the duty of the carrier to protect the passenger insofar as it was practical to do so.

The operator of a carriage, cannot by heeding the urge of the passenger or acquiescing in his desire, place the burden of contributory negligence upon him.

The passenger is presumed not to have equal information with the carrier, either as to the safety of the conveyance or the speed it is capable of making with safety.

If Ellzey was guilty of contributory negligence in urging fast running, Merchant knew it, and it was his duty to protect Ellzey against his own negligence.

Plaintiff could not be guilty of passive contributory negligence. Therefore, the court erred in giving Supplemental Instructions to that effect.

The plaintiff in his special instruction No. 3 requested the court to give the reverse of this charge (which the court refused). See Court's charge, (R-205) and plaintiff's special charge No. 3, (R-208).

Note: Even if the plaintiff could have been guilty of negligence in the encouragement of the speed (as he could not without taking command of the car and ousting the carrier of control), he certainly could not relieve the carrier by merely passively failing to protest.

It will be noted, that in the Supplemental Charge given, the court placed on plaintiff the burden of contributory negligence: if a person of ordinary care situated as he was would have appreciated the danger. Certainly if any such theory as passive contributory negligence could apply to a passenger, it would have to appear that he knew and appreciated the danger (and not that a person of ordinary care would have known and appreciated the danger), and with full knowledge of the danger had an opportuity to avoid its consequences, and failed to do so.

The theory of the trial court that the carrier could relieve itself of liability as such, without being forced to surrender the control of the vehicle to the passenger, is believed to be inconsistent with our present day civilization—to say nothing of the error in telling the jury that it could relieve itself of its duty as a carrier by heeding the urge, or worse still, by responding to the encouragement of the passenger; and the still worse fallacy of saying that the passenger could lose his rights by failing to protest against the manner of operation.

The plaintiff presents the following propositions:

FIRST

The court erred in not giving our Special Charge "A," being a peremptory charge in favor of the plaintiff on the issue of liability.

Weisshaar vs. Kimball S. S. Co., 128 Fed. 597; 63 C. C. A. 139;

Lynn vs. Southern Pacific Railway Company, 24 L. R. A. 710.

Hutchinson on Carriers, 2nd Edition, Sec. 654C.

Also Drovers pass cases including Norfolk Southern Ry Co. vs. Chatman, 244 U. S. 276.

SECOND

The court erred in instructing the jury in substance that Ellzey would be guilty of contributory negligence if he urged Merchant to run the car at a dangerous rate of speed, and in obedience to such urge Merchant wrecked the car by fast driving, because there was no evidence raising the issue; and if there had been, the carrier could not escape liability by acceding to the request of the passenger to operate the vehicle negligently—it being the duty of the carrier to protect Ellzey against his own negligence, if any there was.

Indianapolis & St. Louis Ry. Co. vs. Horst, 93 U. S. R. 291.

Philadelphia & Reading Ry Co. vs. Derby, 14 Howard 486.

The Steamboat New World vs. King, 16 Howard, 469.

New York Central Ry. Co. vs. Lockwood, 17 Wallace, 357.

Norfolk Southern Ry. Co. vs. Chatman, 244 U. S. 276.

In the comparatively late case of Norfolk S. Ry. vs. Chatham, 244 U. S. 276, it is definitely announced that a care-taker though riding on a pass is a passenger for hire, and that the carrier can not contract against his negligence.

THIRD

The court erred in instructing the jury in substance that Ellzey's right of recovery would be defeated if he acquiesced in the negligent operation, or failed to abandon the car at the earliest possible moment to avoid the consequences of negligent operation, because there was no evidence tending to show that Ellzey knew the car was being operated at a dangerous rate of speed, and because he did not owe the duty of setting up his judgment aaginst that of the operator; and it was the duty of the operator to protect his charge or guard from the dangers of negligent operation; and Ellzey had the right to rely upon the operator's supposedly superior judgment as to the speed of the car.

10 Corpus Juris, Section 1490, page 1107, 6 CYC, page 641.

Inland Sea Board Coasting Co. vs. Tolson, 139 U. S. 558.

Pennsylvania Ry. vs. Reed, 60 Fed. 694; 9 C. C. A. 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 Fed. 4; 112 C. C. A. 583.

(Note-588) Reviewing authorities from various states.

FOURTH

That inasmuch as Ellzey, a passenger for hire, could not contract in advance to relieve the carrier from its negligence on the trip, he can not be held to have impliedly so contracted by encouraging, acquiescing in, or failing to protest against the negligent operation, or failing to abandon the car "at the earliest possible moment."

Weisshaar vs. Kimball S. S. Co., 128 Fed. 597; 63 C. C. A. 139.

These propositions are raised by our various assignments of error copied in Appendix to this brief.

The propositions will be discussed in their order.

I.

The court erred in refusing to give Special Charge "A" directing a verdict for plaintiff.

The plaintiff having in his special charge "A" asked the court to direct a verdict in his behalf, the court should have directed a verdict for the plaintiff because there was no evidence whatever tending to relieve the defendant of liability.

Plaintiff's Requested Charge "A":

"You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of speed,

therefore you will return a verdict in favor of the plaintiff for the damages he has sustained." (R-206)

The court refused plaintiff's peremptory instruction, and directed a verdict for the defendant, if Ellzey directed, encouraged, acquiesced in the speed, or failed to protest against it, or failed to abandon the car, saying: (R-205)

> "In other words, coming more particularly to the case in hand; if you should find that in this case the plaintiff, urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law, constitute contributory negligence."

It was clearly the duty of the court to have directed a verdict in the case, and the right of plaintiff to such directed verdict will be more fully presented under our next propesition.

II.

The court should have directed a verdict in favor of the plaintiff, because the uncontroverted evidence showed that at the time of the wreck the plaintiff was a passenger on said car, or the relations such that defendant owed him the duty of special protection, and the uncontroverted evidence showed, as well as the admission in the answer of the defendant in error, that the wreck was caused by Merchant negligently running the car at a dangerously high rate of speed, and there was no evidence showing or tending to show that the plaintiff was guilty of contributory negligence, or that any other circumtance existed which

would deprive the plaintiff of his right to recover for the damages sustained; and the uncontroverted evidence showed that the plaintiff sustained great damage to the amount of several thousand dollars.

The plaintiff groups his First, Second, Third and Fourth Assignments or Error, (R-277-8), and his Thirteenth Assignment of Error, (R-233) each of which in varying forms present the contention that the plaintiff was entitled to a peremptory instruction.

Before presenting excerpts from the testimony supporting our contention, we call the attention of this court to the case of Weisshaar vs. Kimball, S. S. Co. 128 Fed. 397; 63 U. S. C. C. A. 139—certiorari denied by the Supreme Court, 194 U. S. 638, for a discussion of the rights, duties, responsibilities and liabilities of the carrier in protecting his pasesngers. This was a case where a boat was overloaded and the person in charge contended that the passengers had taken charge, urged and practically forced him to proceed on the trip that resulted in the boat being sunk by being overcrowded, and appears to be an unanswerable pronouncement of the law in our favor. The court said:

> "Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky,' it became the duty of all the passengers to get out—as well as those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made

nothing more than a milk and water protest against the entry of anyone; *and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe.* Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

We may add that it appears that no authority can be found which holds that a passenger will be guilty of contributory negligence by acquiescing in, or even encouraging the carrier to operate the carriage at high speed.

In examining the evidence to determine whether the issue of contributory negligence was raised, this court will look to the situation of the parties, as their conduct must be measured by their responsibility.

There exists in every honorable guard a pride to faithfully discharge his duty and give full protection to the person or thing entrusted to his keeping or protection, which impels him to do all that is in his power to discharge his duty; and which would cause him to shudder at the thought of abandoning his charge to the very dangers from which he has agreed to protect him—the law must not be given such a twist as to encourage, much less require the guard to abandon his trust.

Under the direction of the Attorney General of the United States, Ellzey, United States Deputy Marshal, was assigned to duty on the K. C. S. Railway, at its urgent request during the general shopmen's strike of July, 1922. (R-133)

On August 10th, 1922, under direction of its superintendent, Ellzey was guarding a telegraph lineman against threatened personal violence while the lineman was traveling over the road on a motor car to make repairs on the telegraph line. By reason of the lineman operating the car at a negligent reckless rate of speed, it was derailed, and Ellzey seriously and permanently injured.

> There was no testimony which tended to show that Ellzey commanded the fast running, and very meager testimony that he encouraged or acquiesced in the speed, and no testimony that he knew or appreciated that it was dangerous to run the car at the rate of speed at which it was being operated.

There was no protest or objection made by the operator of the car against running it at the high rate of speed.

The evidence offered by plaintiff to sustain his charge of fast running, was with reference to the speed of the car as it left the Rose Pine station, a few hundred yards before the wreck. There was no evidence of fast running at any other place other than the contention made by the witnesses, Adams and Merchant —that at Carson, Merchant had stated in substance that he was about through with his wild riding.

Merchant, the operator of the car, testified unqualifiedly, Transcript, (R-151) that he had the right to operate the car on into Leesville, and no witness testified to any fact or circumstance remotely hinting that Merchant was not acting within the scope of his employment when the wreck occurred, we dismiss that as a conclusively proven fact, and inasmuch as the defendant alleged in its answer that the wreck was caused by fast reckless running of the car, and that the evidence conclusively showed that it was being operated at a dangerously high rate of speed, we might with safety treat that as a definitely settled fact in the case, and proceed to examine the record for the purpose of determining whether there was any evidence remotely tending

to show that Ellzey was guilty of contributory negligence, which barred his right of recovery.

Inasmuch as we seriously and confidently insist that there is no evidence in the case which raises the issue of Ellzey's contributory negligence, we have for the benfit of the court and ready access thereto, copied from the transcript of the evidence all of the testimony offered by the defendant which remotely hints at the conduct of Ellzey relied upon by the defendant to establish contributory negligence in coercing, encouraging, or acquiescing in the operation of the car, or failing to abandon it, and annexed in to the end of this brief as "Appendix B."

The witness, Adams testified for defendant, (R-136-137), "that Merchant and Ellzey said they were going to Leesville ahead of train No. 2, and that he told Ellzey he didn't think they had time to go to Leesville, and Ellzey said he would go if the motor car stayed on the track. Merchant said that he was about through with his wild driving, and Ellzey said that they would have some more of it if it stayed on the track."

He also testified, Transcript of Record, "that Merchant said he preferred to leave the car at Carson or DeRidder because they didn't have time to go further ahead of No. 2, and that Ellzey said 'he was going to Leesville ahead of No. 2 if it stayed on the track.' "

While I have copied from the transcript and attached as Appendix B, all of the testimony relating to the contentions of the witnesses of the defendant as to what is relied upon to show Ellzey was guilty of contributory negligence, the above statement of the evidence puts it in the strongest form that can possibly be contended for, consistent with the facts as disclosed by the Railway in the case.

R. E. Ellzey testified, Record 37, "that he had never had any experience in running or operating motor cars, never rode one before, had no experience in the operation of railroads, had

never worked in the train service, or done any kind of railroad work."

On page 73, Record, he testified, "that he was sent with Merchant, and that he would have taken the risk of losing his job if he didn't stay with him."

On page 81, Record, he testified: "I was just risking myself in his hands while I was with him because he knew the car, and I didn't. I left the operation of the car up to him, and he left the protection part up to me."

Ellzey testified unqualifiedly that he never urged, caused or advised Merchant to carry the car to Leesville, and that he merely accompanied Merchant as a guard in accordance with the instructions given him by J. E. Murphy, general superintendent of the defendant. No witness testified that Ellzey knew anything about operating a motor car, or the speed that could be made with safety.

ARGUMENT

It will be observed that we are confronted with a case when stated most favorably to the defendant—where a United States Deputy Marshal, in the pay of the Government, doing guard duty received injuries by reason of the motor car on which he was being carried having been negligently operated at a dangerously high rate of speed, and that the Deputy Marshal advised the continuation of the trip when the operator of the car expressed a desire to desist from making the trip, and Ellzey acquiesced in the high rate of speed that the operator was expected to thereafter make.

There is not a scintilla of evidence that tends to show force or coercion on the part of Ellzey. The evidence referred to (and it is the strongest in the record) does not raise the issue of Merchant having even made a "milk and water protest" as to the trip or fast running. See *Weisshaar vs. Kimball* S. S. Co., 128 Fed 397.

Under these circumstances, it is our contention that the evidence does not remotely raise the issue of Ellzey's contributory negligence.

Ellzey was unquestionably a passenger for hire on the car, or the relations were such that it unquestionably owed him the same duty—that is a very high degree of care, and could not directly or impliedly contract against its negligence.

The doctrine of Ellzey being a passenger for hire is no new doctrine, and is firmly established in the jurisprudence of this country, and especially by the decisions of the Supreme Court of the United States in what is commonly known as "Drovers Pass" cases, where the tender or guard of live stock riding on a pass is held to be a passenger for hire—certainly the tender or guard of the carrier's own employee under general strike conditions, is in as favorable situation as the guard of live stock, which is being handled or carried as freight. See Drovers Pass cases as follows:

Indianapolis & St. Louis Ry. Co. vs. Horst, 93 U. S. R. 291.

Philadelphia & Reading Ry. Co. vs. Derby, 14 Howard, 486.

The Steamboat New World vs. King, 16 Howard, 469.

New York Central Ry. Co. vs. Lockwood, 17 Wallace, 357.

Norfolk Southern Ry. Co. vs. Chatman, 244 U. S. 276.

In the comparatively late case of *Norfolk S. Ry. Co. vs. Chatman*, 244 U. S. 276—it is definitely announced that a caretaker though riding on a pass is a passenger for hire and that the carrier cannot contract against his negligence.

The plaintiff's Special Charge (A) directing a verdict for plaintiff should have been given. It was the duty of the carrier to protect the passenger insofar as it was practical to do so.

The operator of a carriage can not by heeding the urge of the passenger place the burden of contributory negligence upon him.

The passenger is presumed not to have equal information with the carrier, either as to the safety of the conveyance or the speed it is capable of making with safety.

Weisshaar vs. Kimball S. S. Co. 128 Fed. 397; 63 C. C. A. 139.

Lynn vs. Southern Pacific Company, 24 L. R. A. 710.

Hutchinson on Carriers, 2nd Edition, Sec. 654c.
Little vs. Haskett, 116 U. S. 371.

The right to make a direct contract against negligence being denied by law, there can be no implied contract relieving the carrier by attempting to class it as contributory negligence growing out of the passenger's suggestion of fast driving.

If Ellzey was guilty of contributory negligence in urging fast running, Merchant knew it, and it was his duty to protect Ellzey against his own negligence.

10 *Corpus Juris, Section* 1490, *page* 1107; 6 *CYC, page* 641.

Inland Sea Board Coasting Co. vs. Tolson, 139 U. S. 558.

Pennsylvania Ry. vs. Reed, 60 Fed. 694, 9 C. C. A 219.

Norfolk & A. Terminal Co. vs. Rotolo, 191 Fed. 4, 112, C. C. A. 583.

(*Note*-588) *Reviewing Authorities from various states.*

It is believed to be so clear that a passenger can not be guilty of contributory negligence in urging high speed in that it would defeat the purpose of the law, that one only has to remember that a passenger could

not make a contract in advance with the carrier that he would assume the risk growing out of the speed to be made on the journey when it reached the point of constituting negligence upon the part of the carrier.

Plaintiff could not be guilty of passive contributory negligence. Therefore the court erred in so charging in Supplemental Instruction.

The plaintiff in his special instruction No. 3 requested the court to give the reverse of this Special Charge (which the court refused). See Court's Charge, Record, page 205 and plaintiff's special charge No. 3, (R-230).

Even if the plaintiff could have been guilty of negligence in the encouragement of the speed (as he could not without taking command of the car and ousting the carrier of control) he certainly could not relieve the carrier by merely passively failing to protest.

It will be noted that in the supplemental charge given, the court placed on plaintiff the burden of contributory negligence, if a person of ordinary care situated as he was would have appreciated the danger; certainly if any such theory as passive contributory negligence could apply to a passenger, it would have to appear that he knew and appreciated the danger, (and not that a person of ordinary care would have known and appreciated the danger) and that with full knowledge of the danger had an opportunity to avoid its consequences, and failed to do so.

The doctrine of imputed negligence applies to injuries inflicted by third persons and not to injuries inflected by the carrier.

It is a doctrine as old as the law of carriers that the passenger entrusts himself to the care and custody of the carrier, relying and having the right to rely upon the carrier's supposedly superior knowledge in the selection of the means of carriage, and the control of the manner of operation. That the carrier

obligeth himself to carefully transport and safely discharge at the end of the journey.

It is likewise settled in all the jurisdictions in this country, that the passenger can not contract with the carrier to relieve it of the responsibility of its negligence or that of its servants; and that where the passenger has negligently placed himself in a situation of danger, or has been guilty of contributory negligence which might result in injury to him, that if the carrier ascertains the situation of the passenger or the existence of his negligence, that the duty devolves upon the carrier to protect the passenger against injury that might result from such negligence.

Applying these propositions that are so old and well settled as that none can afford to admit ignorance thereof to this case, we are driven to the inevitable conclusion that the carrier is responsible to Ellzey for the loss sustained by him.

It is believed that the authorities may be searched in vain for the establishment of a rule that would suggest that the evidence in this case is sufficient to raise the issue of Ellzey's contributory negligence.

I pause to here remark that I confidently believe that honesty and fairness, the fundamental principles of right and justice demand the establishment of the doctrine—

That where a quasi public corporation appeals to the majesty of the National Government for protection of its new employees in its effort to break a general strike, that while the guard may assume the risk or undertake the danger incident to injury from third persons, that the railroad is unqualifiedly responsible to him as an insurer against injuries by its own employees.

There is a presumption that the operator, and not Ellzey knew the car and its capabilities, and Ellzey could not be held responsible for the wreck unless he forced the driver, thereby taking over the operation of the car.

There was no evidence to support such a theory.

Ellzey swore (Trans. of Record 48) that he knew nothing of the condition of this car or any other motor car—had never rode one and had no information as to speed it was capable of making. This was not disputed.

Ellzey, a passenger, could not be guilty of passive contributory negligence, neither could he be guilty of active contributory negligence in directing the operation of the car, unless his conduct amounted to taking over the car and forcing its operation.

A passenger can not make a solemn written contract relieving the carrier of its responsibility for negligence. Therefore, a passenger can not by giving instructions or advice be guilty of contributory negligence —certainly he can not be guilty of such negligence by failing to set up his judgment against that of the carrier, or passively accepting the conduct of the carrier.

There is no evidence of coercing or driving upon the part of Ellzey.

There was not sufficient evidence to raise the issue of the car being used beyond the scope of Merchant's authority. Therefore, Ellzey was a passenger.

There are three propositions upon which it seems to us that a new trial must inevitably be granted.

That the court erred in instructing the jury in effect that Ellzey while a passenger could be guilty of passive contributory negligence, and further that he could be guilty of such contributory negligence by failing to do that which a person of ordinary care and prudence would have done in the way of trying to check the speed of the car under the circumstances of the situation.

In the first place, a passenger can not be guilty of contributory negligence in directing or encouraging the manner of the operation of the car—such contributory negligence would amount to a contract on the part of the passenger to relieve the carrier of his negligence.

Certainly the passenger could not be guilty of passive contri-

butory negligence where a person of ordinary care and prudence would have acted differently to that which the particular passenger did. In other words, if it were possible for the passenger to be guilty of passive contributory negligence in such a situation, he could only be guilty of contributory negligence where he *knew* and *appreciated* the danger, and *with that knowledge failed* to act as a person of ordinary care would have acted. It is not what a person of ordinary care would have done, but what a person of ordinary care *having the information of danger, if any,* which *Ellzey* had, would have done.

A great number of cases could be cited to sustain this proposition, but it seems that only a few are necessary.

It is really the duty of the carrier to protect the passenger against his own negligence instead of acquiescing in his negligence to his injury.

Hutchinson on Carrieds, Second Edition, Sec. 654c.

Weisshaar vs. Kimball S. S. Co., 128 *Fed.* 397, 63 *U. S. C. C. A.* 139, *certiorari denied by the Supreme Court,* 194 *U. S.* 638. It appears the U. S. Sup. Ct. approved this case inasmuch as a writ of certiorari was denied. *Lynn vs. So. Pac. Co., Cal.,* 24 L. R. A. 710.

Where the relation of carrier and passenger exists, the law obligeth the carrier to protect him from all injury that can be avoided by the exercise of that very high degree of care consistent with the nature of the business in which the carrier is engaged.

In the Weisshaar case, it appeared that Weisshaar was drowned by the sinking of a boat that was being used to carry passengers from the shore to the ship anchored in the bay about a mile and a half from the beach. It appeared that before the boat left the beach the second mate, who was in command of the boat, notified those that were in it that it was overcrowded, and asked some of them to get out and wait until the boat could re-

turn for them. The officer continued to protest that the boat was overcrowded.

The Trial Court held that deceased was guilty of contributory negligence in remaining in the boat after he and other passengers were notified by the officer in command that the boat was overcrowded, and were asked to leave the same.

The commander testified that he had no power to prevent them from overpowering the boat.

> "They took the command away from me, and took control of the boat, and I could not do nothing."

The court in setting aside the decree of the Trial Court said among other things:

> "A careful perusal of the entire testimony of this witness, of itself, shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce."

The case of *Lynn vs. So. Pac. Co.*, 24 L. R. A. 710, is also in point.

It is believed that there is no substantial authority sustaining the contention that the negligence of the carrier can be imputed to the passenger in any action by the passenger against the carrier for injuries wrongfully inflicted upon him.

The defendant seems to have fallen into the error, and probably the trial court also, of confounding the doctrine announced by the courts of some states to the effect that in some instances where the passenger is a point operator of the vehicle, or is in control thereof, or assumes the authority to manage the same, that the negligence of the driver will be imputed to the passenger in *those cases in which the passenger is attempting to recover damages for injuries negligently inflicted upon the passenger by third*

persons—a very different situation to that in which the passenger as here is endeavoring to recover damages against the *carrier* for the mis-conduct of the driver.

With reference to the instrumentalities used for the trip, such as the conveyance, the track, and the personal conduct of the driver, the passenger is at law presumed to be wholly ignorant of the soundness of the instrumentalities and the speed capability of the vehicle, and in the very nature of things is required to subject his will and opinion with reference to the use of these instrumentalities, to that of the driver who is entrusted with the trip, and whatever the relation between the parties in a suit by the person making the trip subject to the discretion of the driver, the courts have not permitted the owner of the vehicle engaged in the enterprise, to suggest that the person being carried, has by encouraging the speed become guilty of contributory negligence that will defeat his recovery. *Little vs. Hackett,* 116 U. S. 371.

Under the theory set forth by the trial court in this case a passenger for hire is presumed to know as much as the carrier about the carrier's business; he is presumed to have an equal voice with the carrier in the management of the business; and, if the carrier operates his business in a negligent and dangerous manner, and the passenger, hapless ignoramus though he may be, fails to object and is injured by such negligence, he loses his right to recover damages from the negligent wrong-doer.

This theory is in conflict with every decision upon the liability of carriers; and we shall attempt to demonstrate its absurdity by offering example.

Suppose, let us say that a railway company undertakes to transport a passenger upon one of its trains and that, because of delays, the train is late and must run at a speed of eighty miles an hour over defective track in order to catch up with its schedule. This, of course, would be negligence and an ordinarily prudent man situated as the passenger was would probably have

realized that it was negligence for the train to run at such speed over such a track.

However, if the negligence of the railway company caused the train to wreck and the passenger was injured thereby, we can hardly imagine a court of law saying that the fact that the passenger did not actively protest against the fast running would deprive him of his right to recover damages from the negligent wrong-doer—although the trial court has practically done so in the case at bar.

In other words, the passenger entrusts himself to the carrier; and the carrier, because of the very nature of his business, becomes responsible to the passenger for the manner in which the vehicles are run—whether the vehicles used are motor cars or parlor cars. To hold otherwise would be to apply communism to railroading, and would force passengers to take a voice in the operation of all trains—which would be impractical, to put it mildly. We think that the law is that a *passenger, so long as he remains a passenger, cannot be guilty of negligence in the manner of operation of the vehicle.*

It is only when he has forcibly taken such control of the situation as to make the transaction a joint enterprise that the duty of exercising care shifts from the carrier to the passenger. (Weisshaar vs. Kimball S. S. Co., Supra).

In the present case there is not a scrap of testimony tending to show that Ellzey had "taken charge." If a passenger in a train had suggested or insisted to the conductor that he ignore orders and proceed past a meeting point, the conductor had done so, and a collision, in which the passenger was injured, had resulted, would the carrier have been permitted to plead the passenger's contributory negligence as a defense? We do not think so. As the carrier has full control of his vehicles and his agents, he must also take full responsibility for both when a passenger's rights are involved. (In the present case, it will be remembered that Ellzey was an employee of the Federal Govern-

ment and that he had no control over the motor car and no control over the driver, Merchant).

In this particular case Ellzey as guard entrusted himself to the care of Merchant. The Railway Company furnished the track, the vehicle and the driver.

In the very nature of things, the guard was not entrusted with the management of the vehicle.

A careful perusal of the testimony discloses that the testimony of the defendant, if it were conceded that it were true, does not go further than to intimate that Merchant made a half hearted protest against driving the car to Leesville.

The testimony is conclusive that he had the right to take Ellzey on the car to Leesville, and that he undertook to do so, and that the carrier by retaining him in its employ for almost two years thereafter, ratified and approved his conduct.

The mere suggestion that the driver preferred not to go to Leesville was wholly insufficient to apprise Ellzey that he was exceeding his authority or to fix upon Ellzey the burden of assuming responsibility for his acts.

We call attention to the fact that the evidence in this case is nothing like so strong in favor of the defendant in error as was the evidence in the Weisshaar case, and yet in that case, the court frankly announced that the issue of contributory negligence as to those in that boat was not raised by the evidence.

It is of course unnecessary to cite authorities to sustain the contention that a person riding in a conveyance as guard for stock, or for a man or men is a passenger for hire, and that the carrier can not contract against liability for negligence that may result in injury to them.

See *Norfolk Ry. Co. vs. Chatman,* 244 U. S. 276, and innumerable authorities.

In support of our contention to the effect that if Ellzey had been guilty of contributory negligence (and he was not), in urging Merchant to drive the car to Leesville, or urging him to in-

crease the speed thereof, that the subsequent negligence of the defendant in running the car at a high rate of speed was the proximate cause of the injury—in fact that the conduct of the carrier amounted to affirmative active negligence in a situation where it was its duty to have protected its charge or passenger against his own negligence, I cite the following authorities.

This rule of law so definitely applicable to passengers is in a measure the re-statement of the last clear chance doctrine:

In 6 *CYC, page* 641, it is said:

> "The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well recognized rule that if the negligence of the passenger is known to the servants of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of his servants in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause."

Authorities from a number of states are cited in support of this doctrine. Also English case of *Rodley vs. London, etc., Ry. Co.* 1 *App. cases* 754, 46 *L. J. Exch.* 573; 35 *L. T. Rep. N. S.* 637, 25 *Wkly Rep.* 147; 9 *Cenly. Dig. Title* ~~Commrs.~~ Carriers *Sec.* 1354.

In 10 *Corpus Juris,* page 1107, it is said:

> "The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury, leads to a well recognized rule that, if the negligence of the passenger is known to the employee of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required by carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury,

which fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause."

Quite a number of authorities from various states are cited in support thereof, and when we turn to the courts of the United States, we find that in the case of *Chunn vs. Washington City Railway Company*, 207 U. S. 302, the doctrine is announced by the Supreme Court of the United States. Also *Inland Sea Board Coasting Company vs. Tolson*, 139 U. S. 558, where the following instruction was approved:

> "There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and dis-entitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

Also *Norfolk* x *A. Trminal Co. vs. Rotolo*, 112 C. C. A. 585, and note reviewing authorities.

Same case 192 Federal 4.

Among other things in the Tolson case, 139 U. S. 551, the court says:

> "The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet the officers of the boat knew just where and how he stood, and might have avoided him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts the defendant's negligence was the proximate, direct and efficient cause of the injury."

Defendant is confronted with the rather awkward situation that the carrier pleads that Merchant was running the car at an excessive rate of speed, and that Ellzey acquiesced therein or

encouraged it, but defendant does not even contend that he coerced or forced such speed.

The law in such state of the case made the defendant liable for the failure of Merchant to protect the plaintiff, as it was plainly under the authorities, the duty of Merchant to have protected the plaintiff against his negligence, if any there was.

This duty arose because if plaintiff was guilty of negligence Merchant should have refused to do that which would result in injury to the plaintiff from such negligence. Also plaintiff being a passenger no contract express or implied could exist that would relieve the Company of Merchant's negligence.

Inevitably under the defendant's answer, it was unconditionally liable to the plaintiff in the absence of proof and a finding that the enterprise had been abandoned, and Merchant and the plaintiff were engaged in a mission of their own.

There is in fact no evidence that tends to show that Merchant was exceeding his authority in taking the car over the track, as he testified that he did have the right to take the car over the track to Leesville if he wished to do so, and no one disputed that testimony; and none of the testimony is sufficient to raise a substantial issue that he was forced or coerced by the plaintiff into taking the car over the track to Leesville; nor was there any substantial testimony tending to raise the issue that the plaintiff demanded or coerced Merchant to drive the car at a reckless high rate of speed; and inasmuch as the plaintiff could not under any circumstances be guilty of contributory negligence relieving the carrier, no defense whatever was made.

It seems very clear that the plaintiff was a passenger at the time he was injured, and that the court should have granted the plaintiff's request for a peremptory instruction to that effect.

A person riding under the circumstances under which plaintiff was being carried on the motor car is clearly a passenger, and entitled to that very high degree of care and protection guaranteed to the passenger by the law of passenger carriers.

Merchant was the boss of the situation; the captain of the ship; the officer in command, so to speak.

The cases cited in support of our contention are what is commonly known as "Drovers' pass cases" or in other words, cases where persons are permitted to ride on freight trains as care-takers of live stock. Certainly the care-taker or guard of an employee under "strike conditions" who had to guard the employee who was entrusted with the duty of keeping open the telegraph lines so that interstate trains could be operated, was on as favorable footing as a care-taker of live stock on a freight train. It is probable that he was on a better footing. In fact, it would be in keeping with fairness, common sense and justice, and will probably be held finally by the United States Supreme Court, to lay down the rule that such guard under such circumstances is unconditionally entitled to recover where his injury results from the negligence or misconduct of any of the servants of the carrier, and certainly where it results from the negligence of the person that he is guarding. That is to say, that a carrier is an absolute insurer of the guard's safety, to the extent that he will not be injured by the culpable negligence of the servants. In the nature of things the guard may have taken the responsibility of being injured by outside interference; that is what he was there for, but as to the defendant's appliances, instrumentalities and the conduct of its servants, he was insured against injuries. However, what I have said with reference to the absolute and unconditional liability of the defendant, is not attempted to be supported by adjudicated cases, but is stated on the basis of common fairness, honesty and justice.

Coming now to a discussion of the high degree of care incumbent upon the Railway Company in this case, I call attention of the court to the fact that the plaintiff had nothing whatever to do with the selection of the instrumentalities or the control thereof. He was sent out with the specific duty to "guard Merchant until he should return to Shreveport."

The duty required of the defendant in safely transporting and caring for Ellzey can not be more aptly and clearly stated than by a quotation from the case of *Indianapolis Railway Co. vs. Horst*, 93 U. S., page 296—where the learned judge after having referred to the liability of the Railway Company to a passenger accompanying his cattle on a freight train, as set forth in *Railway vs. Locke*, 17 *Wallace*, 357—used the following language:

> "The highest degree of carefulness and diligence is expressly enacted." This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in the case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same consideration apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it."

To raise the issue of contributory negligence on the part of Ellzey, it must be admitted he was a passenger, and there must have been substantial evidence showing that he, with knowledge of the dangers that might result, coerced and forced Merchant to operate the car at a dangerous rate of speed, thereby causing the wreck. That is to say that the carrier selected the vehicle, and

undertook the job charged with a superior knowledge of its fitness, and legally responsible for it being adequate and sufficient for the purpose for which it was to be used, and absolutely and unconditionally bound itself to exercise a very high degree of care in the operation thereof for the safety of the passenger. It is believed that nothing short of coercion or force could excuse the character of conduct that amounted to negligence on the part of the carrier, and certainly the conduct which the defendant in its answer admitted amounted to a reckless disregard of the safety of the passenger that the law charged it with the duty of protecting.

There was no conduct on the part of the plaintiff substantially raising the issue of contributory negligence as applicable to the facts of this case.

It it were possible to construe the testimony of Merchant and Adams so as to claim that the plaintiff was guilty of such conduct at the station Carson as to raise the issue of contributory negligence, the subsequent negligence of Merchant's fast running was the proximate cause of the injury, and there was no evidence whatever tending to show such facts as would excuse the defendant from responsibility therefor.

In the California case, *Lynn vs. Southern Pacific Co.*, the defendant had permitted its car to become overcrowded with passengers, and therefore making it necessary for the injured person to ride on the platform. The court uses this language:

> "The defendant should not have allowed so many passengers to have gone upon its cars, and if it was unable to prevent them from doing so, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platform, it was under obligations to exercise the additional care commensurate with the perils of danger surrounding the passengers by reason of the over-crowded condition of the cars."

This is but a reiteration of the common sense doctrine that

the carrier is the boss of the situation, and that he has the right in fact it is his duty to refuse to proceed in the face of danger. It is believed to be a mockery to even suggest that Merchant was forced to carry Ellzey on the motor car either from Carson on, or from DeRidder on. Merchant had the right, the privilege and it was his duty to refuse to proceed unless he was willing to bind his master by making him responsible for the outcome of his conduct if he did proceed. Ellzey was merely accompanying him to protect him from outside personal violence. He was clothed with the power; the master had placed him in charge of the situation, and was responsible for his every act unless such act was in open violation of instructions or rules, and so unless plaintiff knew that he was acting in such violation of rules. However that is purely academic, for the testimony conclusively shows without contradiction in this case that Merchant was not acting without the scope of his authority. There is not even a scintilla of testimony that remotely suggests that he was not acting fairly and exclusively in his rights.

The plaintiff here calls attention to the strongest case (*Weisshaar vs. Kimball*) apparently possible to support his position with reference to the duty of the defendant, and the inability of the defendant to escape the consequences of the wrongs committed by Merchant. It will be remembered that any conduct upon the part of Merchant tending to show that the journey was continued over his protest is very meager indeed, and that the most that the defendant can claim for such conduct upon the part of Merchant is that it was a mild protest against proceeding. He did not at any time contend that he protested against fast running, or that he was running the car at a higher rate of speed than he was willing to run it, except the very mild statement he made at Carson miles before the derailment, that "he was through with wild driving," and this statement made at the depot at Carson and not supported by any testimony whatever that remotely tended to show that they had been running the car at a higher rate of speed than was entirely safe for it to be run.

Now bearing in mind the testimony in this case, and placing upon it the very strongest construction against the plaintiff and in favor of a theory of the defendant being forced, coerced or even encouraged to run the car at a high rate of speed, I call attention to the case of *Weisshaar vs. Kimball,* above referred to, and to the important fact that in that case it conclusively appeared that a boat was overcrowded, over the protest of the person in control thereof, and that he insisted on some of the passengers leaving the boat and objected to starting on the journey unless they should do so, but nevertheless he started on the journey, the boat was sunk and Weisshaar among others lost his life. In discussing this conduct of the person in charge of the operation of the boat, Mr. Justice Ross says with reference to the testimony of the Manager of the boat:

> "At the end of his direct examination this witness was asked: 'Did you have any means or power to prevent them?' To which question he answered: 'I had no power. I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing.' "

The court further proceeds to hold unqualifiedly that if every passenger on the boat including the deceased had known of the danger, and insisted upon taking the risk, that nevertheless it was the duty of the person in control thereof to have refused to start; to have protected them; and that in acquiescing in their demand that the owners of the boat became liable for the disastrous result.

Again in the course of the same opinion the learned Judge says:

> "So here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on

that point is no answer to the gross neglect of duty by the officer of the ship."

In *Hutchinson on Carriers,* Second Ed., Sec. 654C.:

"The passenger has ordinarily no right and is not bound to interfere with the management of the carrier's vehicle or his conduct of the journey. He may ordinarily trust to the carrier's performance of his duty to safe transportation, without regard to suggestions or advice from the passenger. Thus it has been held that the passenger is not chargeable with contributory negligence because he failed to warn the engineer of an impending collision; nor does it excuse the carrier that the driver of a road-vehicle drove out of the road in the dark because the passenger suggested that he was getting out of the track."

II.

Plaintiff having requested the court to give his special charge (A), in effect a peremptory instruction to find for plaintiff, and the court having refused to give such special charge, the plaintiff then requested the court to give his special charge No. 1 as embodied in his fifth assignment of error, which we now present and discuss. (R-228-229)

Plaintiff special charge No. 1 is as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car wrecked and the plaintiff was injured.

"You are further instructed that it was the duty of the defendant's employee, Merchant, to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any proximately resulting therefrom to the said plaintiff.

"Now, if you shall believe from a preponderance of the

evidence that the said Merchant negligently ran the said motor car at a high rate of speed and that by reason thereof the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

"Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as consistent with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plainitff a car that was safe for the purpose for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purpose for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff." (R-288-229).

This charge if given, woud have eliminated from the consideration of the jury all questions of whether the employee of defendant was operating the car on an independent enterprise of his own, and all questions of whether Ellzey encouraged or acquiesced in the fast operation of the car, and would have authorized a verdict in favor of plaintiff upon the finding by the jury of negligence on the part of the defendant, either in selecting a defective car, or in negligently operating the car at a dangerous rate of speed.

The matters referred to, have been discussed in detail under our previous propositions, and we believe that the evidence conclusively showed that the car was not being operated beyond the scope of Merchant's authority, and that the plaintiff was a passenger thereon, and that the plaintiff did nothing which in view

of the situation and relation of the parties could be construed to amount to contributory negligence on his part.

The burden of proof was upon the defendant to raise by the evidence the issue of whether Merchant was operating the car beyond the scope of his authority, and as we have seen under our previous proposition, there is an entire absence of any testimony whatever that tends to raise any such defense. The burden of proof was likewise upon the defendant to introduce evidence which raised the issue of the plaintiff "ousting" the man, Merchant, and "taking command" of the situation, and forcing the negligent operation of the car which resulted in the injury to the plaintiff. The defendant has wholly failed to produce a scintilla of testimony which remotely indicates that Ellzey was guilty of conduct, which when considered in relation to the position of the parties and the relative duties of each, as it must be considered, raised the issue of Ellzey being guilty of conduct that would amount to contributory negligence.

The court not only committed the error of declining to give this special charge, but committed a double error by giving the reverse thereof in his main charge, and in special charges requested by the defendant and given by the court, and to which the plaintiff reserved exceptions.

There can be no question of the plaintiff having properly called to the attention of the Trial Judge the errors committed in the main charge and special charges given by the court, at the request of defendant; for his special charge No. 1 is in direct conflict with the theories presented by the court, and forcefully called the attention of the court to the correct theory of law that should have been presented by him to the jury; and the plaintiff also in seasonable time reserved exceptions to the court's main charge, and the special charges requested by the defendant and given, thereby giving ample opportunity for the court to have corrected the error that he had fallen into.

The court instructed the jury over the protest of the plaintiff, and to which the plaintiff excepted, and in direct conflict

with plaintiff's special charges A and 1 requested, (R-195) that it was incumbent upon the plaintiff to show that he was injured while Merchant was acting within the scope of his authority, and that if Merchant was not acting within the scope of his employment at the time of the injury, that no recovery could be had. This charge is also made the specific basis of our tenth assignment of error, (R-232).

The court also instructed the jury (R-195) in substance that the burden was upon the plaintiff in error to show that the injury occurred while Merchant was acting within the scope of his employment doing some act necessary in the discharge of his duties. The charge is also made the specific basis of our eleventh assignment of error. (-232-3).

The court also instructed the jury as follows: (R-196)

> "I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

I believe that this court will have reached the conclusion that the plaintiff's peremptory charge should have been given, but in any event it seems inevitable that the only possible issue of fact involved in this case (if there was an issue of fact, and we do not believe there was) consisted of whether Merchant was guilty of negligence in selecting a defective car, or whether he was guilty of negligence in operating the car at a reckless, high rate of speed. That is to say, whether Merchant discharged the duties that the relation of the parties in view of the situation required that he should discharge for the protection of Ellzey.

We feel that the evidence is conclusive that Merchant failed to discharge the high duties required of him in the protection of

Ellzey, but in any event we insist that he was entitled to have this issue clearly and directly submitted for the determination of the jury without being coupled with or made to depend upon issues which could not operate as a defense to this suit; and certainly without being complicated with such supposedly defensive matters as Ellzey encouraging or acquiescing in the negligent operation of the car.

The court declined to give this clear cut instruction to the jury, but on the other hand instructed the jury repeatedly that Ellzey would be guilty of contributory negligence which would defeat his right of recovery by encouraging the fast operation of the car,—nay even by acquiescing in the fast operation of the car, and even without him knowing that the car was being operated at a dangerously high rate of speed, provided a person of ordinary care in his situation would have appreciated the danger. These defenses were not in fact raised by the evidence, and in fact they constitute no defense to the cause of action of the plaintiff, and the trial court grievously erred to the prejudice of the plaintiff in refusing to give his special charge No. 1, which of course was requested subject to this right to insist upon the court giving his special charge No. A, that being a peremptory instruction to find in favor of the plaintiff the damages by him sustained.

III.

The plaintiff complains of the trial court instructing the jury in substance that if Ellzey urged or encouraged Merchant to run the car at a high rate of speed, and that by reason thereof Merchant operated it at a very high rate of speed and inflictel the in juries upon Ellzey, that Ellzey would be guilty of contributory negligence which would defeat his right of recovery. This was an erroneous presentation of the case, for, as has been pointed out, encouragement or acquiescence on the part

of Ellzey, could not operate to relieve the carrier of the high degree of care due Ellzey.

The court instructed the jury (R-196):

> "I charge you that if you find from the evidence that Merchant was authorized to carry plaintiff from the point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

Again on page 201 of Record, the court at the request of the attorney for defendant, repeated the foregoing instruction substantially. Again after the return had returned into court and had made the following request (R-203): "We want to know what constitutes contributory negligence on the part of the plaintiff;" the court further instructed the jury that the plaintiff would be guilty of contributory negligence if he encouraged or acquiesced in the fast speed of the car. The same error was again repeated by the court, (R-205) the court adding thereto that if the plaintiff knew of the speed, and acquiesced therein, that he would be guilty of contributory negligence which would defeat his right of recovery.

Bearing in mind that the plaintiff had requested the court to instruct the jury to return a verdict in favor of the plaintiff upon the question of liability, and the court having refused this plaintiff's special charge "A;" that the plaintiff requested the court to give special charge "1," submitting to the jury the sole question of whether the defendant was guilty of negligence which proximately caused the injury to Ellzey as the only issue of fact in the case on the question of liability, we come to a consideration of the state of the record with reference to the charges given by the court on the subject of contributory negligence, and which charges were in direct conflict with the special charges "A" and

"1" requested by the plaintiff. The trial court being determined to submit the issue of the plaintiff's contributory negligence as a defense in the case, the plaintiff, after the court had refused to give his special charges A and 1, requested the court to give his special charge No. 3, and we quote from the sixth assignment of error the portion of special No. 3 specially relied upon, namely:

> "You are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car was being operated was dangerous, and unless you such danger, commanded, directed or encouraged the said Merchant to so operate the same." (R-229-230).

And again by said special charge 3 as set forth in our seventh assignment of error:

> "You are intructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the speed at which the said acr was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was, would have interfered and prevented the said Merchant from operating the car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant, and that he had the right to assume that Merchant was familiar with the condition of the car, and knew the rate of speed at which it could be operated with safety, and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence." (R-230)

We wish to emphasize the fact that we consistently protested

that Ellzey could not be guilty of contributory negligence by acquiescing in or agreeing to fast running, nor could he be guilty of contributory negligence by urging, encouraging or even demanding fast running unless he took over the command of the "ship" and ousted Merchant from control and operated it himself or forced Merchant to operate it by physical coercion. But certainly even if we were mistaken as to that contention, as we believe we were not , we had the right to have the jury told, as we requested in our Special Charge No. 3, that Ellzey would not be guilty of contributory negligence by encouraging the operation of the car, when some other person would not have done so, but that it must first appear that he knew it was dangerous to operate it as he was encouraging it to be operated, or as he was acquiescing in it being operated.

The plaintiff having in mind that in case the court should persist in submitting that theory of defense, and after the court had ruled that Ellzey could be guilty of contributory negligence by encouraging or acquiescing in the excessive speed, not only protested against the charge of the court, but by repeated requests endeavored to have the court to at least tell the jury that the plaintiff could not be guilty of contributory negligence in acquiescing in fast speed, unless the plaintiff had actual knowledge of the danger to him from such fast speed. In other words, it is not a question of what an ordinarily prudent man would have known and appreciated and done, but a question of actual knowledge on the part of Ellzey for the reason that if a passenger can be guilty of contributory negligence by encouraging or acquiescing in fast speed (as we believe he cannot) he cannot under any circumstances be held to be guilty of contributory negligence as to the speed of the vehicle, unless the particular passenger who is sought to be charged with the contributory negligence knows of the speed and that it endangers his safety. It matters not what some other person would know or think or believe, for the carrier has undertaken to transport and safely deliver the particular passenger at the end of the journey, and is

chargeable with the high degree of care to protect the passenger even against his own negligence, that is consistent with the relation of the parties.

In our twelfth assignment of error, (R-233) we complain of the court telling the jury that if the plaintiff encouraged or requested Merchant to run the car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, the plaintiff could not recover because he would be guilty of contributory negligence.

It seems that this assignment of error presents a self evident proposition of law, one that should be fundamental; and that the trial court has clearly given an erroneous instruction, which has resulted in injury to the plaintiff.

The plaintiff again complains of the trial court insisting upon submitting to the jury the issue of Ellzey's contributory negligence based upon his encouragement of fast running, as set forth in his fourteenth assignment of error, where he complains of the court instructing the jury as follows: (R-233-234)

"I charge you, gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand-car fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff because the plaintiff cannot now complain that the hand-car was running at an excessive rate of speed if he by his own conduct or request induced Merchant to run the hand car at an excessive rate of speed. In other words, if he induced or requested Merchant, gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's

negligence would have contributed approximately to the injury, which would defeat his recovery."

The plaintiff having without fruitful results requested special charge "A," which would have peremptorily instructed a verdict in plaintiff's favor on the issue of liability, then insisted on his special charge No. 1 being given, which would have submitted to the jury, as the only issuable fact on the question of liability, the issue as to whether the employees Merchant was negligent in selecting the car in question, or in the manner of its use. The court having improperly declined to give the instructions requested, and having submitted the issue of plaintiff's contributory negligence on the basis of "advising, encouraging, or acquiescing" in Merchant's negligent operation of the car, the plaintiff next endeavored to have the court correctly submit each theory (if there was any merit whatever in the contention that the plaintiff could be guilty of contributory negligence under the facts) but the court declined to give any of the said special charges requested by the plaintiff, and told the jury unqualifiedly that if the plaintiff urged or encouraged the operation of the car at the high rate of speed, and that as a result of such high rate of speed, the plaintiff was injured, that he would be deprived of his right of recovery on the ground of contributory negligence. This is so inconsistent with the great weight of authority as is shown under our previous propositions, pages __ to __ of this brief, that we deem it unnecessary to do more than here call attention to the fact that it is believed no case can be pointed out in which one occupying the relation that Ellzey occupied to the defendant, can be held guilty of contributory negligence in a suit against his carrier, by merely encouraging or acquiescing in dangerous speed and certainly that one so charged is entitled to have the jury instructed, that before he could be guilty of contributory negligence in that respect, it would be necessary for the jury to find that he had actual knowledge of the danger that he was about to encounter.

Plaintiff by his tenth and eleventh assignments of error, complains of the court having instructed the jury upon the issue of the defendant not being responsible to the plaintiff upon the theory of the enterprise having been abandoned, and Merchant not being engaged in work within the scope of his employment at the time the plaintiff was injured.

Inasmuch as there was no evidence raising the issue, and all of the testimony conclusively showed that Merchant was acting within the scope of his employment at the time the car was wrecked, it was clearly error for the court to leave to the consideration of the jury this undisputed issue in the case. It was wholly immaterial as to whether the act Merchant was doing at the time of the accident was necessary for the discharge of his duties to the Railway Company, because he testified that he was permitted and had the right to carry the car to Leesville if he saw fit to do so, and inasmuch as there was no evidence offered by the defendant, and inasmuch as the burden was upon the defendant to show that Ellzey and Merchant were out on a "lark" or enterprise of their own, there is no substantial testimony that raises the issue, and therefore the court erred in submitting this issue to the jury, and our tenth and eleventh assignments of error should be sustained.

When we consider that Merchant operated the car over the road from Carson to the place where it was wrecked, and that he testified unqualifiedly that he had the right to make the trip on to Leesville if he saw fit, and that the defendant kept him in its employ until the trial of the case, more than two years after the injury to plaintiff, we are driven to the inevitable conclusion that there was not any evidence tending to raise the issue that Merchant acted beyond the scope of his authority, and that the defendant could not in fact produce any testimony raising that issue.

IV.

I now come to consider the error pointed out by our sixteenth assignment of error, (R-235). Bearing in mind that

the jury had been considering the case for some time, and returned into open court and requested additional instructions on the question of contributory negligence, by asking the court under what circumstances the plaintiff could be guilty of contributory negligence, and bearing in mind the relation of the parties as disclosed by the evidence, I quote the charge that we complain of as a conclusive self evident argument that this assignment of error must be sustained, and the judgment of the District Court should be reversed thereon:

> "If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the position he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." (See R-234-235).

It will be observed that in the first portion of this charge the jury was instructed that if the plaintiff urged, directed or counselled the driver of the car to run it at a reckless rate of speed, that he would be guilty of contributory negligence which would bar his recovery. In other words, the court announces the very antithesis of what is announced by the court in the case of *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 597; 63 C. C. A. 139; and of all of the other cases following that decision and announcing the same doctrine, and by the way which constitutes almost the unquestioned and unbroken line of decisions on the subject.

It seems that the trial court in this case wholly disregarded the fact that under the law the passenger submits himself to

the control of the carrier, and wholly disregards the high obligations resting upon the carrier to discharge the burdens placed upon it by the decisions of the courts, and announced a rule of action in this case that would not only be detrimental to the best interest of society and the general public, but one that is without reason or argument to support it, and without justice or even the necessity of expediency to sustain it. But the court was not satisfied with thus announcing a new and novel doctrine to the effect that the passenger could be guilty of contributory negligence by urging the carrier to be negligent, but made the further startling announcement that if the plaintiff saw the car was being run at a high rate of speed, and saw that he was in danger, or worse that if a man of ordinary care would have appreciated the danger, and he continued to ride on the car without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then he would be guilty of such omission as would constitute contributory negligence which would defeat his recovery.

When we realize that there is not a scintilla of testimony in the entire record that remotely hints at the idea of the plaintiff having been guilty of negligence in failing to abandon the car, it is certainly very difficult for me, to figure out a theory upon which the trial judge acted in thus submitting the case to the jury.

When we consider the proposition in the light of the particular case as we must, and we realize that Ellzey was a guard, sent with Merchant to protect him against threatened personal violence, and instructed to prevent his being injured, it occurs to me that it is the height of absurdity to suggest that he should have left his charge because of negligence, if any, upon his part. Ellzey could no more desert his charge, than a private in the army could desert in the face of the enemy. This theory should never have been presented as a defense in this case.

The case of *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 597; 63 C. C. A. 139; is conclusive upon the contention urged by us, and this opinion seems to have met with the approval of the

United States Supreme Court in that the application for certiorari was denied, 194 U. S. Supreme Court Rep. 638.

It is true that there are a great many conflicts in the charge of the court, but one can not read the entire charge without reaching the inevitable conclusion that the court thoroughly impressed the jury, and that the jury was forced to understand, that it was an issuable fact as to whether Merchant was acting within the scope of his authority, and that even if he was acting within the scope of his authority, that if the plaintiff urged or encouraged (not co-erced or commanded) Merchant to run the car at a high rate of speed, that the plaintiff would be guilty of contributory negligence as would bar his right of recovery, even though the plaintiff may not have known of and appreciated the danger. However, the defendant will certainly be unable to point out substantial authority or furnish logical reasoning to support the theory that even if the plaintiff had knowledge that the car was being operated at too high a rate of speed, he would be guilty of contributory negligence proximately causing the injury by urging or encouraging such speed; for the subsequent negligence of the carrier in acceding to the urge of the plaintiff would have destroyed the acts of plaintiff as a defense to its liability.

An examination of the court's charge also leads to the conclusion that the court sought to impress and did impress the jury that if the plaintiff even acquiesced in the fast speed of the car, that he would be guilty of contributory negligence in not abandoning his post of duty as guard, and that such contributory negligence would defeat his right of recovery.

This theory cannot be sustained by substantial authority, and is wholly inconsistent with our present day civilization, and the theory of our government that common carriers are entitled to overcome and break strike conditions by calling to their aid in the interchange of interstate commerce the Federal Government, which furnishes guards to protect new employees against

threatened violence, but which does not undertake to require its Deputy Marshals on guard duty to take the risk of being injured by the negligence of those they are protecting against injury at the hands of others.

We call attention to the fact that conflicting charges excepted to can not sustain a judgment where it appears that the jury was impressed by the court, in fact led by the court, to accept a theory of the case, and base their verdict thereon, which is not sustained by the settled law of the land. In other words, where it appears as in this case, that a party to a suit is deprived of a substantial right when the charge is considered in its entirety, and it appears that the party has diligently endeavored to have the court correctly submit the case to the jury, the error is of such substantial proportions as that the case should be reversed to the end that substantial justice may be done.

The defendant seems prone to side-step the position taken by the plaintiff, and the authorities relied upon by him, and inject into the case an illusory and new theory that had its birth in the old case of *Thorogood vs. Bryan,* decided by the Court of Common Pleas, 1849, H. C. B. 114. This theory was to the effect that in an action by a passenger against a third party for injuries resulting to him by reason of the negligence of his carrier, combined with that of the third party, that the negligence of his carrier is imputed to the passenger; a doctrine which has really been exploded in England, and has never been recognized to any extent in this country, and which was directly repudiated in the case of *Little vs. Hackett,* 116 U. S. 366; where Mr. Justice Field points out the absurdity of visiting upon the passenger the wrongs of his carrier, even in a suit against a third person, and calls attention to the fact that the doctrine would lead to holding the passengers responsible to third persons for injuries inflicted by the negligence of the carrier, and to the absurdity of relieving the carrier from liability to his own passengers.

I am aware of the fact that some courts have recently held that one riding in a vehicle such as a carriage or automobile may

be guilty of such contributory negligence, as will defeat his right of recovery against a third person by not looking out for his own safety, but I find no cases of modern standing which hold that even as between the passenger and a third party whose negligence combined with that of the carrier to injure the passenger, the negligence of the carrier is imputed to the passenger, though in some cases the rule is announced that the passenegr may be guilty of such negligence as will relieve the third party of liability.

The defendant may cite a number of cases sustaining the doctrine of the negligence of the passenger relieving the third party, but I do not believe that it will be able to cite any reputable substantial authority that announces the doctrine that the passenger is in any case chargeable with the negligence of the carrier as here, *as between the passenger and his carrier.*

It would in my judgment be pushing a defenseless doctrine to the point of ridiculousness and absurdity to hold that the carrier can escape the consequence of his own negligent conduct by reason of the fact that the passenger did not set up his judgment against that of the carrier—to say nothing of the absurdity of a guard being denied the right of recovery because he did not abandon the person that he had undertaken to protect from personal violence.

In urging our objections to the manner in which the court presented the case to the jury in the general charge, and urging our criticism of the different paragraphs of the charge presenting the issue of contributory negligence, we are not unmindful of the fact that if the issue of contributory negligence was raised by the evidence (which we deny), that it does not necessarily follow that because the court has mis-stated the law of contributory negligence in some paragraphs of the charge, that the case must be reversed. However, the rule does prevail that if the charge taken as a whole does not correctly submit the issue of contributory negligence as applicable to the facts of the case,

the erroneous statements of the law therein contained require a reversal of the case.

It is our contention that the evidence does not raise the issue of contributory negligence on the part of Ellzey, but if this court should disagree with that contention, it will certainly reach the conclusion that Ellzey could not be guilty of contributory negligence unless he did that which amounted to wresting the control of the machine from the operator and assuming full responsibility for its movements. The charge of the court has not so limited or attempted to limit or define the law; but on the contrary, clearly impresses the jury that if Ellzey—

> Urged the operation of the car at a high speed, or
>
> Encouraged the high speed, or
>
> Acquiesced in the high speed, or
>
> Failed to abandon the car at the earliest possible moment if he recognized the high speed, or worse,
>
> That if a person of ordinary care and prudence, situated as was Ellzey, would have discovered that the car was being operated at a dangerous rate of speed and failed to abandon it at the earliest possible moment, he would be guilty of contributory negligence.

These incorrect statements of law are such as to strongly indicate, if not conclusively show, that the jury was led to reach an erroneous verdict thereby. Certainly, when we realize that there was no evidence raising the issue of the car being used beyond the scope of Merchant's authority, or if any, that it was of the flimsiest and most unconvincing character; and that there was no evidence raising the issue of Ellzey's contributory negligence, or if any, that it was merely a scintilla of evidence, are we led to the inevitable conclusion that injury was done by the erroneous statement of law and that substantial justice has not prevailed, and that therefore, the case should be reversed with directions for a new trial to be granted.

The plaintiff respectfully prays that for the many errors by the trial court committed, denying him substantial justice therein,

the said cause be reversed and remanded to the trial court for another trial on the merits of the case, and that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

JONES, JONES & BUCK,
Marshall, Texas and Fort Worth, Texas, and

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Attorneys for Respondent.

APPENDIX "A"

FIRST ASSIGNMENT OF ERROR

The court erred in refusing to give to the jury the special instruction No. "A" requested by the plaintiff, which was in effect a peremptory instruction, and as follows:

> "You are instructed that the evidence in this case shows that the plaintiff was a passenger on the motor car, and that the injuries inflicted upon him were caused by reason of the said motor car being run at an excessively high rate of speed, therefore, you will return a verdict in favor of the plaintiff for the damages he has sustained."

SECOND ASSIGNMENT OF ERROR

The court erred in refusing to give a peremptory charge in favor of the plaintiff in that the defendant requested the court by written motion filed to instruct a verdict for the defendant, and the plaintiff by his special charge "A" requested the court to direct a verdict for the plaintiff, and there being no sufficient evidence to raise the issue of a defense in said cause, but under the uncontroverted evidence the plaintiff being entitled to recover the damages sustained by reason of the injuries he received, the court erred in submitting the said cause to the jury on issues of negligence, and in failing and refusing to decide the said cause and render judgment on the issues of negligence in favor of the plaintiff.

THIRD ASSIGNMENT OF ERROR

The plaintiff and the defendant having each by their written request asked the court to direct a verdict in this cause on the question of liability, the court erred in failing to do so, and in submitting the said cause to the jury on the question or issue of liability, but should have so decided the said cause in accordance with the said request of the said parties plaintiff and defendant.

FOURTH ASSIGNMENT OF ERROR

The court erred in refusing to direct a verdict in favor of the plaintiff as to liability because the uncontroverted evidence showed that the plaintiff was injured by reason of the negligence of the defendant and under such circumstaces as that the defendant was liable to him for the damages he sustained, and that he had sustained damages in a very large amount, and the defendant offered no evidence whatever that would justify the court in submitting to the jury the question of the defendant's liability to the plaintiff.

FIFTH ASSIGNMENT OF ERROR

The court erred after declining to give the plaintiff's peremptory instruction "A" in refusing to give to the jury the said Instruction No. 1 requested by the plaintiff as follows:

"You are instructed that the evidence in this case shows that the plaintiff was a passenger for hire on the motor car which was being operated by the defendant's employee, Merchant, at the time the car wrecked and the plaintiff was injured.

"You are further instructed that it was the duty of the defendant's employee, Merchant, to exercise that high degree of care in the operation of the motor car that a person of ordinary care and prudence would exercise while transporting passengers on a motor car, and failure, if any, on his part to do so, would constitute negligence and authorize a recovery for damages, if any approximately resulting therefrom to the said plaintiff.

"Now, if you shall believe from a preponderance of the evidence that the said Merchant negligently ran the said motor car at a high rate of speed and that by reason thereof, the said motor car was caused to leave the track and injure the plaintiff, you will find in favor of the plaintiff.

"Again, you are instructed that it was the duty of the defendant to exercise a high degree of care such as consistent with the service of transporting the plaintiff as a passenger on the motor car, to furnish the plaintiff a car that

was safe for the purposes for which it was to be used; and if you shall find that the said defendant failed to exercise a high degree of care in furnishing to the plaintiff a motor car that was safe for the purposes for which it was to be used, and you shall find that the said motor car was defective and out of repair to such an extent as that it was not reasonably safe to use the same in hauling passengers over the track thereon, and if you shall find that by reason of such defective condition of the said car and by reason of negligence on the part of the said Merchant in the operation thereof at a dangerously high rate of speed, if he did so operate the same, that the said car was caused to leave the track and as a proximate result thereof the plaintiff was injured, then you will find in favor of the plaintiff."

SIXTH ASSIGNMENT OF ERROR

The court erred after refusing to give the plaintiff's peremptory special charge "A" and plaintiff's special charge No. 1 requested in refusing to give to the jury the special instruction No. "3" requested by the plaintiff as follows:

"You are instructed that the mere encouragement of the said Merchant to operate the car at a high rate of speed would not constitute contributory negligence on the part of the plaintiff, but for him to be guilty of contributory negligence such as would bar his right of recovery, you must find that the plaintiff knew that it was dangerous to operate said car at such high rate of speed, and with knowledge of such danger commanded, directed or encouraged the said Merchant to so operate the same."

SEVENTH ASSIGNMENT OF ERROR

The court erred, after refusing to give the peremptory instruction "A," and plaintiff's special charge 1, requested by the plaintiff, in refusing to give to the jury the special instruction No. 3 requested by the plaintiff, in the following language:

"You are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or re-

quest the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered with and prevented the said Merchant from operation (operating) the car at so high a rate of speed. That is to say—it was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence."

EIGHTH ASSIGNMENT OF ERROR

The court erred, after declining to give plaintiff's peremptory instruction "A," and plaintiff's special charge 1 and 3 above referred to, in refusing to give to the jury the special instruction No. B, requested by the plaintiff, which is as follows:

"Again you are instructed that if the plaintiff knew that the said Merchant was in fact operating the said car over the track in violation of the rules and regulations of the said company, and if the plaintiff after obtaining such knowledge had an opportunity to abandon said car at a regular station of the said defendant, and negligently failed to do so, then the plaintiff would be guilty of contributory negligence, and could not recover. However, in this connection you are instructed that the plaintiff had the right to assume and to act upon the assumption that the said Merchant would not operate the said car in violation of the rules and regulations of the said company and unless the said-plaintiff knew that the said Merchant was in fact violating the rules of the said company in operating the said car and acquiesced in and agreed thereto after an opportunity to

have abandoned the said car at a station of the defendant, he can not be held guilty of contributory negligence."

NINTH ASSIGNMENT OF ERROR

The court erred after declining to give plaintiff's peremptory instruction "A" and plaintiff's special charges 1 and 3 above referred to, in refusing to give to the jury the special instruction No. B, requested by the plaintiff which is as follows:

"You are instructed that the plaintiff would not be guilty of contributory negligence proximately causing the injury by merely encouraging the said Merchant to operate the said car at a high rate of speed unless it shall appear from the evidence that the plaintiff knew that it was dangerous for the car to be so operated at such high rate of speed. In this connection you are instructed that the plaintiff had the right to assume that the said Merchant knew the speed at which the said car could be operated with safety, but that if the plaintiff knew that he was encouraging, commanding or directing the said Merchant to operate the said car at a rate of speed that was not reasonably safe, the plaintiff would be guilty of contributory negligence and could not recover."

TENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows; which was given at the request of the defendant as its special instruction No. 1:

"I charge you, Gentlemen of the jury, that while as a general rule the master is liable for the negligence of the servant, it must appear that such fault or negligence on the part of the servant was committed in the course of his employment and the master is not liable for a fault or negligence of the servant committed by him while not prosecuting the work of the master. That is, where he ceased to perform the duty for which he was employed and puts off on some other expedition or uses tools which are put in his hands for his own benefit, and not for the purpose of the

business of the company; then he ceases to be an employee of the company, and the company is not responsible for his damage. Therefore, if you find that Merchant, the employee of the Kansas City Southern Railway Company was not acting within the scope of his employment at the time of the accident to the plaintiff, it is immaterial whether Merwas negligent or not, because the plaintiff cannot recover against the defendant unless Merchant was acting within the scope of his employment at the time of the negligence charged to have been committed."

NOTE: Plaintiff reserves an exception to this charge.

ELEVENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows, and was given as a part of defendant's special charge No. "2":

"I charge you that it is not enough for you to find that Merchant was an employee of the defendant railway company in order to hold it liable for the accident of which the plaintiff complains. In order to recover for the consequences of this accident, the plaintiff must show, and you must find by a preponderance of the evidence, that the negligence of Merchant occurred while he was doing some act necessary in the discharge of his duties towards the defendant. If you find that the act that he was doing at the time of the accident was not necessary for the discharge of his duties to the railway company, then I charge you that he had ceased to be within the scope of his employment and for his acts during such time the defendant is not liable. In other words, what I have said before is that the question is to be determined reasonably by what he was doing at the time."

TWELFTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows:

"I charge you that if you find from the evidence that Merchant was authorized to carry the plaintiff from the

point where he repaired the wires of the defendant company past other stations along its road to the town of Leesville, and you find that the plaintiff encouraged or requested Merchant to run such car at a fast rate of speed, and the accident was occasioned because of such fast rate of speed, I then charge you that plaintiff could not recover, because he would be guilty of contributory negligence."

THIRTEENTH ASSIGNMENT OF ERROR

The court erred in refusing to give plaintiff's special charge "A" which was in effect a peremptory charge to find for the plaintiff on the question of liability, because the uncontroverted evidence in the case showed that the said Merchant was acting for the defendant, and within the scope of his employment when the plaintiff was injured, and the uncontroverted evidence, as well as the admissions of the defendant made in its answer filed in said cause, showed that the said injury to the plaintiff was caused by the said Merchant operating the said car at an excessive and dangerously high rate of speed which constituted negligence.

FOURTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which is as follows, and is referred to in said charge copied herein as defendant's special charge No. 20:

"I charge you, Gentlemen, if you find from the evidence that the plaintiff solicited or requested Merchant to run the hand car fast, or at an excessive rate of speed, and in compliance with such request Merchant did run it fast, or at an excessive rate of speed, then I charge you that the plaintiff was guilty of contributory negligence even if Merchant was guilty of negligence and even if Merchant was acting within the scope of his employment in thus transporting the plaintiff, because the plaintiff cannot now complain that the hand car was running at an excessive rate of speed if he by his own conduct on request induced Merchant to run the hand

car at an excessive rate of speed. In other words, if he induced or requested Merchant, Gentlemen, to run the car at a dangerous rate of speed, when it was apparent to any reasonable man in the same circumstances as plaintiff was, it would make no difference that Merchant was in the employ of the company and discharging his duties in the course of his employment, because the act of the plaintiff and the plaintiff's negligence would have contributed approximately to the injury, which would defeat his recovery."

FIFTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the charge to the jury which was given after the jury had retired to consider their verdict, and had returned into open court, and asked for additional instruction, and which is as follows:

"If, in this case, you find that there was negligence on the part of the defendant in failing to provide a safe conveyance, failing to operate the conveyance upon which the plaintiff was traveling, in a safe manner, through its agent, who, though found from the evidence, were acting within the scope of the employment, but notwithstanding such negligence, the plaintiff himself participated in counselling, directing or encouraging in such negligence, or careless act on the part of those who were so engaged, then you would have in law that which would amount to contributory negligence, and which would bar recovery."

SIXTEENTH ASSIGNMENT OF ERROR

The court erred in that portion of the additional charge given after the jury had returned into open court, and asked for additional instruction as follows:

"If you should find that in this case the plaintiff urged, directed or counselled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a

manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence."

APPENDIX "B"

TESTIMONY OF DEFENDANT IN ERROR WITH REFERENCE TO TRIP FROM CARSON WHERE LINE WAS REPAIRED TO LEESVILLE

H. E. Adams, station agent at Carson, testified after stating that they remained at Carson for more than an hour, during which time they carried some part of the motor car to the saw mill for repair, (R-134), that he heard the conversation between Ellzey and Merchant about their going to Leesville, as follows: (R-135)

Q. Will you state the substance of that conversation?

A. Well, they said they were going to Leesville ahead of No. 2, and I told Ellzey I didn't think they had time to go to Leesville ahead of No. 2, and he said he would go if the motor car stayed on the track, and he would make it.

Q. Who said that?

A. Ellzey; this fellow Ellzey that was a guard.

Q. What, if anything, did Merchant say?

A. Merchant said that he was about through with his wild driving.

Q. Then what reply did Ellzey make?

A. He said that they would have some more of it if the damn thing stayed on the track.

Again on page 136:

Q. What did Merchant say, if anything, about leaving the car at Carson or at DeRidder?

A. He said he would prefer to leave it there because they didn't have time to go further ahead of No. 2.

Q. No. 2 going north was the train to Shreveport?

A. Yes sir.

Q. What did Ellzey say in reply to Merchant?

A. He said he was going to Leesville ahead of No. 2 if it stayed on the track.

He testified further, page 137,, that they could have boarded the train at Carson and left the motor car there.

He testified, (R-138), that he knew Merchant was a

lineman going over the track looking for trouble on the telegraph lines, and that Ellzey was a guard protecting him while doing that work, and that it was usual and customary for the lineman to travel on motor cars.

He testified on page 139, that they left Carson approximately twenty-five minutes ahead of the passenger train schedule, and that the distance to Leesville was twenty-eight miles, and the passenger train schedule 2½ minutes to the mile, or twenty-five miles per hour. He testified, Transcript 138, that Merchant was not discharged but kept working for the company.

Merchant had eighty-four minutes time to make it ahead of the passenger train, or practically twenty miles per hour.

He testified, (R-144), that in going out on the line from DeQuincy, he found trouble on the board at Singer and fixed it and proceeded north.

Continuing, on page (R-144), that there was no other trouble along the line, and no further work on the wires, and that after they left Singer they went north to Carson, and after leaving Carson, went on to DeRidder. That DeRidder is six miles north of Carson. That they made repairs on the motor car at Carson, the gas line having broken, they took it out and took it to the saw mill at Carson and had new threads cut on it.

On page 145-146, that after they repaired the car at Carson, that he and Ellzey had a conversation about the trip, in which Ellzey told him that the Special Agent at DeRidder wanted him to go back there, but that he (Ellzey) was going on north.

N. B. It is strangely inconsistent with defendant's theory that Ellzey was controlling the movement of the car northward, in that we find that Ellzey had said nothing about going to Leesville at the time they left Singer, and that Merchant was proceeding directly away from DeQuincy in traveling from Singer to Carson.

On page 146:

Q. Before you got to Carson, had you been running the car fast?

A. Yes sir.

Q. Did you make any statement to Mr. Ellzey about the speed of the car before you got to Carson?

A. No sir.

On page 146:

Q. What, if anything, did Mr. Ellzey say about the speed of the car from Carson on your trip north?

A. Well, let her go. I have got to get to Leesville ahead of No. 2.

Q. Can you recall exactly what Ellzey said about the speed or about the trip on to Leesville?

A. No sir.

Q. What did he say at the depot at Carson?

A. I was working on the switchboard, and I said something to Mr. Adams—I asked him if there was some place to get the motor car fixed at, and he said there was, and then he asked me where we were going and Ellzey told him we were going to Leesville on the motor car, and to Shreveport on No. 2. I says, I had about enough of that wild driving, and he said, we will have some more of it if the damn thing stays on the rail.

Q. Did you tell Mr. Ellzey in the presence of Mr. Adams there at the station where you wanted to stop?

A. I told him that I didn't think that we could go to Leesville for No. 2.

Q. Did you say anything about where you wanted to leave the motor car?

A. At DeRidder.

On page 147, he said he wanted to leave it at DeRidder, so the train could get it.

Q. Did you say anything to Ellzey about wanting to stop in DeRidder?

A. Yes sir.

Q. What did he say?

A. Said we were going on to Leesville where we started.

Q. Where did he tell you that?

A. At the depot at Carson.

Q. Why didn't you stop at Carson—why didn't you leave the car there?

A. There was no conveniences there and no crew for a night train to pick it up.

Q. Did you tell Ellzey that you wanted to leave the car at DeRidder?

A. Yes sir.

Q. And he said what?

A. To go to Leesville.

Q. Why did he want to go on to Leesville?

A. I don't know.

Q. So, then you went on to Leesville at the instance of Mr. Ellzey himself?

A. Yes sir.

On page 148-149:

Q. State what, if anything, Mr. Ellzey said to you about the speed of the car after you left Carson?

A. Well, we had to go through a tunnel at DeRidder (evidently means switch), and he says, "We will have to run now"—and he stopped somewhere else at DeRidder and lost about four minutes; and he said, "We sure enough will have to run now."

Q. Did Mr. Ellzey make any criticism or complaint with reference to the ability of the car to make more speed?

A. Yes sir. He said, "What is the matter with the damn thing, it won't run any more?" When we started down the hill north of Ludington, he wanted to know what was the matter with the damned thing, it would not run, and Merchant told him that one of the cylinders had stopped working. That was between DeRidder and Leesville.

CROSS EXAMINATION

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When the cylinders cut out, it reduced the speed of the car and they continued to operate on two cylinders.

On page 151, he says they (meaning linemen) used the motor car to get over the line all the time. That they left it to

be picked up—they left the motor car at different places. Ultimately to be carried back where it was borrowed.

On pages 151-152:

Q. Now you had the right to go on to Leesville?
A. Well, yes sir.
Q. You had that right?
A. Yes sir.
Q. Would not have done that if you had not?
A. Well, yes, if he insisted on going to Leesville.
Q. You might have done that even if you had not had the right?
A. Yes sir.
Q. But you had the right to go there?
A. Yes sir.

Pages 152-153—that Murphy, the superintendent, sent him from Leesville to repair the telegraph line, and sent Ellzey with him to guard him. That another lineman had been beaten up in that territory.

Page 154—that he, Merchant, got the motor car; that he tried out two before he found one that would work; that they finally started north, and the gasoline line broke before they got to Singer—in fact, about seven miles out of DeQuincy—and that they had to feed it with gasoline from a bottle.

That they finally got to Singer and repaired the line there, and on pages 155-166, that they traveled on north to Carson, still feeding the motor gas from a bottle, and stopped at Carson. That they had to push the car part of the distance from where the gas line broke, seven miles out of DeQuincy on up to Carson.

Page 156:

Q. You had told Mr. Ellzey you were going to De-Ridder?
A. I suggested to Mr. Ellzey that we stop at De-Ridder, and he said, "We will go to Leesville."
Q. Ellzey suggested that you go to Leesville?
A. Yes sir.
Q. Now, when you started out from Leesville, did Mr.

Murphy—he told you that Ellzey was to go with you and guard you, didn't he?

A. Yes sir.

Q. You knew that he was going as your guard?

A. Yes sir.

Q. That he was to protect you?

A. Yes sir.

Q. When you went—that is correct, isn't it?

A. No answer.

Q. You knew that he was to guard you?

A. Yes sir.

Q. And was to stay with you as long as you wanted him?

A. Yes sir.

Page 157:

That he left Carson and went on towards Leesville, and that he operated the car from DeQuincy up to the time the wreck occurred.

Page 205:

Ellzey did not operate the car.

Page 157:

According to this witness, they left DeRidder with twenty-one miles to run, seventeen minutes ahead of the schedule time of the passenger train.

Page 159:

Q. You and Ellzey were not frightened?

A. No sir.

Q. You didn't leave Carson and go to Leesville because you were frightened?

A. No sir.

The plaintiff respectfully prays that for the many errors by the trial court committed, denying him substantial justice herein, that the judgment of the Circuit Court of Appeals be affirmed,

and the said cause be reversed and remanded to the trial court for another trial on the merits of the case.

Respectfully submitted,

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O. W. BULLOCK, Shreveport, Louisiana,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1927.

Kansas City Southern Railway Co., Petitioner, *vs.* R. E. Ellzey.	Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a United States deputy marshal, was assigned to guard Merchant, a telegraph lineman employed by petitioner, from violence by strikers. He went with Merchant to repair a telegraph line and while returning with him on a motor car over petitioner's railroad the car was derailed and respondent injured. Respondent brought the present suit in the district court for western Louisiana to recover for his injuries. The trial by jury resulted in a verdict and judgment for the defendant, the petitioner here. The court of appeals for the fifth circuit [12 Fed. (2d) 4] reversed the judgment, holding that an instruction to the jury by the trial judge was erroneous.

There was evidence from which the jury could have found that the accident and injury were caused by the negligent operation of the motor car by Merchant at a dangerously high rate of speed. There was also evidence from which it might have found that respondent contributed to his own injury either by urging Merchant to drive at excessive speed or by failing to object to Merchant's obvious negligence. That part of the charge designated by the court below as erroneous is as follows:

"If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must

reasonably have known that to continue in the situation he was in was dangerous without protecting or donning and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence."

The court of appeals in holding this instruction improper pointed out portions of the evidence indicating that respondent's conversations with Merchant, relied on to show that he urged or advised Merchant to drive the motor car at a dangerous rate of speed, took place at Carson and later at De Kalb, on petitioner's line, and that the accident occurred after leaving De Kalb and while proceeding north from that point to Leesville. It pointed out also that under the quoted instruction the respondent could not have recovered if the jury found that he had voluntarily remained on the car after he saw it was being negligently run. The court considered this erroneous, saying:

"Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury, and plaintiff's negligence be deemed a remote cause. *Chase v. City & Suburban Ry.*, 207 U. S. 302 . . . . The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it."

This language suggests that the circuit court of appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the *Chase* case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident. *Grand Trunk Ry. v. Ives*, 144 U. S. 408, 429; *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558. In the cases applying the rule the parties have been engaged in independent courses of negligent conduct. The classic instance is that in which the plaintiff had negligently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle. *Davies v. Mann*, 10 M. & W. 546. It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later.

On the facts summed by the circuit court of appeals—that Merchant was driving the car recklessly with respondent's encouragement or acquiescence—the respondent and Merchant were engaged in a common venture which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence. Compare *St. Louis & San Francisco Ry.* v. *Schumacher*, 152 U. S. 77; *Wheelock* v. *Clay*, 13 Fed. (2d) 972; *Kinney* v. *Chicago, Great Western R. R.*, 17 Fed. (2d) 708; *Denver City Tramway Co.* v. *Cobb*, 164 Fed. 41.

We think that the doctrine of the last clear chance was not involved here. If the jury found negligence on the part of the defendant then their verdict turned on whether they thought the respondent was guilty of contributory negligence. Whether the instructions were sufficient in this respect is the only substantial question before us. The trial judge charged generally in various forms that respondent's negligence, as a bar to recovery, must be found to have contributed "proximately" to the injury, and that if respondent committed Merchant to run the car at a reckless rate of speed and by reason of his encouragement Merchant negligently operated the car, and as a result of that negligent operation the injury occurred, "or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." Again the jury was instructed that respondent "could not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence, so situated, would have abandoned the car."

We think these instructions and others of similar import, read as we must read them in the light of the whole charge, were sufficiently favorable to the respondent on the subject of contributory

negligence. Perhaps it would have been permissible to tell the jury that, though respondent had at an earlier moment encouraged or acquiesced in Merchant's recklessness, he might still recover if later and before the accident he repented and asked Merchant to drive carefully. But the court's failure to do so, in the absence of a specific request, seems to us not to be ground for reversal.

The respondent suggests here numerous other objections to the charge as given. We have considered them and find that they present no substantial question requiring further comment. The judgment of the district court is affirmed and that of the court of appeals is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.